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No. 96-_____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

SHEARSON LEHMAN BROTHERS, INC.f/k/a SHEARSON LEHMAN HUTTON, INC.and SHEARSON LEHMAN BROTHERS HOLDINGS, INC.f/k/a SHEARSON LEHMAN HUTTON HOLDINGS, INC.,
Petitioners,
v.
HUGHES, HUBBARD & REED,
Respondent

Petition for Writ of Certiorari to the Supreme Court of the State of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can the state courts of Texas constitutionally exercise long-arm jurisdiction over a national law firm when it is sued for inadequately representing its underwriter client before the Texas Securities Board relating to the blue sky registration of the securities of a Texas partnership?

2. Can the state courts of Texas constitutionally exercise long-arm jurisdiction over a national law firm when it is sued for incorrectly advising its underwriter client regarding Texas securities laws and regulations when such advice subjects the underwriter to regulatory enforcement action by the Texas Securities Board?

3. Should a trial court address the merits of plaintiff's claims in determining whether it can constitutionally exercise personal jurisdiction over the defendant?

4. Can the state courts of Texas constitutionally exercise long-arm jurisdiction over a national law firm when it is sued by its client, a national underwriting company, for breach of the law firm's fiduciary duties and for breach of contract related to the law firm's conflicting representation of a Texas partnership and company?

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Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Texas

PETITION FOR WRIT OF CERTIORARI

Petitioners, Shearson Lehman Brothers, Inc. f/k/a Shearson Lehman Hutton, Inc. and Shearson Lehman Brothers Holdings, Inc. f/k/a Shearson Lehman Hutton Holdings, Inc. (together "Shearson"), pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Texas.

OPINIONS BELOW

Shearson sued its lawyers, Hughes, Hubbard & Reed (or "HHR"), for (a) advising incorrectly regarding Texas law, (b) failing to represent Shearson adequately in registering securities of Texas-based Houston Partners, L.P. before the Texas Securities Board, and (c) breaching its fiduciary duty to Shearson by representing a conflicting Texas client.

HHR filed a special appearance challenging the trial court's exercise of personal jurisdiction, which was granted with the notation, "the case should be removed to a New York forum." Appendix A at 1a-3a. The trial court also signed HHR's proposed findings and conclusions *verbatim* the day they were received, retaining even the title, "[PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW GRANTING SPECIAL APPEARANCE."

The court of appeals affirmed the dismissal. *Shearson Lehman Bros. v. Hughes, Hubbard & Reed*, 902 S.W.2d 60 (Tex.App. -- Houston [1st Dist.] 1995, writ denied)(appendix C at 4a-20a).

The Texas Supreme Court denied writ of error on November 22, 1995 (appendix D at 21a) and denied Petitioners' motion for rehearing of that denial on January 11, 1996 (appendix E at 23a).

GROUNDS FOR JURISDICTION

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257. In accordance with Rule 13.4 of this Court, this petition was timely filed within 90 days of the Texas Supreme Court's denial of Petitioners' motion for rehearing.

CONSTITUTIONAL PROVISION INVOLVED

This action arises from the protections of the fourteenth amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Houston Biotechnology, Inc. ("HBI" or "Houston Biotech") hired Shearson's predecessor, E. F. Hutton & Company Inc. ("Hutton"), as the underwriter for a public offering to raise funds for research at HBI's facility in The Woodlands near Houston.[1]

Hutton, as underwriter, turned to HHR, one of its regular outside counsel, to represent it in negotiations with Houston Biotech and in the planned offering of its securities. Hutton hired HHR primarily for its purported "blue sky" expertise. HHR, which claimed a national blue sky practice, was eventually hired to register Houston Biotech's securities in all 50 states.

Despite this being HHR's regular practice area, however, something went horribly wrong in Texas: Shearson became subjected to adverse regulatory action by the Texas Securities Board, which caused it to expend over $5.4 million in a rescission offer to every Texas purchaser of the Houston Biotech securities.

Shearson later sued HHR in Texas for malpractice and breach of fiduciary duty, but that suit was dismissed on

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[1] Hutton merged into Shearson mid-way through the subject public offering.

the basis that the trial court lacked personal jurisdiction over HHR despite its Texas-centered activities. Shearson requests that this Court review that decision because it is based on reasoning that is inconsistent with the opinions of this Court and because it establishes a dangerous precedent on an important issue of constitutional law.

The background to Shearson's malpractice claim

HHR represented Hutton in all aspects of the Houston Biotech offering, including an early decision to offer limited partnership units in a newly formed entity, Houston Biotech Partners, LP ("Houston Biotech Partners") and in drafting the documents creating Houston Biotech Partners and registering it to do business in Texas. HHR travelled to Texas once to conduct due diligence and again to print the documents that (a) created Houston Biotech Partners and (b) defined Hutton's and Houston Biotech's rights in the offering, including *their agreement that Houston Biotech would pay all blue sky filing fees*.

HHR also participated in deciding how many units to register in Texas. Complicating that decision, Houston Biotech had limited cash reserves prior to the offering and wanted to pay the smallest possible registration fee.[2] HHR accordingly advised Hutton to register fewer securities in Texas than Hutton planned to sell. Then, HHR prepared the Texas application for only $1 million, despite its knowledge that Texas sales would far exceed that amount.

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[2] Texas' fee schedule is based on a percentage of the securities expected to be sold, with no maximum, so the more securities registered, the higher the fee. Most states have a maximum fee by which an unlimited number of securities can be sold, eliminating the possibility of an oversale.

Although HHR's advice and Texas application virtually assured a Texas oversale, HHR did no research to determine the effect of such an oversale and did not advise Hutton of the consequences of selling more than the registered amount.

Following the initial Texas application, HHR, as Hutton's legal representative, communicated with the Texas Securities Board in support of the Houston Biotech offering. HHR also had other direct communications with individuals in Texas as part of its efforts in Hutton's behalf.

HHR's duties in the nearly year-long offering included filing the final sales report required by the Texas Securities Board, one purpose of which was to detect an oversale or other potential regulatory problem, so that the registration could be corrected. In preparing the sales report for Texas in May of 1988, HHR learned that more Houston Biotech securities had been sold in Texas than were initially registered.

The discovery of the Texas oversale caused immediate concern, because HHR knew that if the registration was not corrected Shearson or Houston Biotech could be required to offer to rescind all the securities sales in Texas -- exactly what eventually occurred.

HHR advised Shearson orally and in writing that the Texas oversale could be cured by retroactively amending the initial registration application by paying three times the normal filing fee for the oversold portion of the securities, a cost of approximately $15,000. Despite the potentially devastating consequences, however, HHR did no legal research to substantiate this advice, relying instead on one HHR partner's off-the-cuff opinion of Texas law.

If HHR had done even the barest research to substantiate its advice regarding Texas law, it would have learned that the deadline for paying the required $15,000 fee was one year from the effective date of the initial Texas registration, or July 23, 1988, and HHR would also have learned that failing to meet that deadline would trigger exactly what HHR feared -- a rescission offer to all Texas investors. The remedy, its deadline, and the consequences of failing to meet that deadline are all expressed in the same section of the same statute.

In response to HHR's incomplete advice, but consistent with its original agreement with Houston Biotech, Shearson directed HHR to instruct Houston Biotech to pay the additional registration fee. For a number of reasons explained in the next section, HHR totally ignored that instruction and instead advised Houston Biotech (at its office in Houston) to pay only the non-penalty portion of the required fee amount (approximately $5,000). Beyond ignoring Shearson's instructions, HHR also neglected to inform Shearson of Houston Biotech's refusal to pay the remedial portion of the fee.

The July deadline passed without Shearson's ever being informed of the deadline or of Houston Biotech's resistance to paying the fee.

As a direct result of HHR's incomplete representation of Shearson before the Texas Securities Board and its failure to follow Shearson's instructions in communicating to Houston Biotech, Shearson lost its opportunity to correct the problem for a cost of $15,000 and instead became forced by the Texas Securities Board to offer rescission to all Texas purchasers of the Houston Biotech securities. That offer cost Shearson over $5.4 million.

The background to Shearson's claim for breach of fiduciary duty

Shearson's claim for breach of fiduciary duty derives from HHR's divided loyalties between Shearson and the Houston Biotech entities, which stemmed from Hutton's merger into Shearson in early 1988, mid-way through the offering.

Hutton originally had a management interest in Houston Biotech Partners, but its merger into Shearson triggered a right in Houston Biotech to assume that interest. HHR drafted the documents that transferred that role from Hutton to Houston Biotech.

Since HHR already had an attorney/client relationship with Shearson (the underwriter) and Houston Biotech Partners (the issuer), the transfer of partnership management from Hutton to Houston Biotech created the potential for a conflict of interest; following the merger, the partnership would no longer be controlled by HHR's client, Hutton, but instead by its other client, Houston Biotech, and HHR would begin receiving its instructions for the partnership from Houston Biotech.

HHR wrote Shearson of the possible conflict and expressly promised Shearson that if the conflict materialized it would withdraw from representing all parties.

Risk from the conflict weighed against Shearson because HHR's client contacts at Shearson were former Hutton people, many of whom departed Shearson soon after the merger, threatening reduction in HHR's blue sky work. That risk became personified in John Crary, HHR's main Hutton contact for blue sky work and the principal Hutton/Shearson representative for the Houston Biotech offering.

Shortly after the merger and unbeknownst to Shearson, Crary decided to leave Shearson *to join the Houston Biotech entities*.

Crary confided to HHR (but not to Shearson) his plan to move to the Houston Biotech entities, and HHR assisted Crary's departure from Shearson, including drafting a consulting agreement between Crary and the Houston Biotech entities and an agreement enabling Crary to purchase an interest in the partnership. HHR invoiced its time for that assistance to Shearson.

Importantly, at the same time Crary was actively preparing, with HHR's (and Shearson's unwitting) assistance, to jump from Shearson to the Houston Biotech entities, HHR (supposedly in behalf of Shearson) was also drafting numerous documents to effectuate Houston Biotech's takeover of Shearson's management role, all of which were reviewed and signed in behalf of Shearson by John Crary -- as he and HHR covertly planned his employment change to the other party to those agreements.

Shearson's claim for breach of fiduciary duty is based on HHR's conflicting representation of the Houston Biotech entities, which manifested itself when Crary decided to leave Hutton/Shearson. When Crary's loyalties shifted, HHR's loyalties also shifted, despite HHR's earlier written promise to the contrary. As a result of that shift in loyalties, when Shearson directed HHR to obtain the $15,000 remedial fee from Houston Biotech, HHR called its friend, John Crary, now at Houston Biotech and advised him to pay no more than one-third of the fee. Despite the clear conflict over who would pay the remedial fee, HHR continued to represent *both* Shearson and the Houston Biotech entities and never informed Shearson that the conflict had arisen or that Houston Biotech refused to pay the remedial fee as Shearson

had requested. If HHR had provided any of that information to Shearson, Shearson could have taken steps to insure the fee was paid.

HHR's shifted loyalties were vividly confirmed after HHR discovered that the deadline for amending the Texas registration had passed and that regulatory action from the Texas Securities Board was imminent. Within days of discovering the passing of the deadline, HHR drafted a memorandum to Houston Biotech's general counsel in Houston that chronicled HHR's version of the case, including alleged lapses by Shearson. The memorandum included detailed descriptions of alleged conversations between HHR and its client, Shearson, but, of course, omitted any mention of HHR's failures or conflicts of interest. Shearson was never shown or even informed of the memo, and its permission to disclose its attorney-client communications with HHR was never sought or received.

After the Texas Securities Board began enforcement action, HHR visited Texas for an "all hands" meeting regarding the oversale problem. Although Shearson discharged HHR as its counsel following the meeting, HHR continued (without Shearson's knowledge and in violation of HHR's promises) to represent the Houston Biotech entities against Shearson, particularly regarding the indemnity agreement between Shearson and the Houston Biotech entities concerning who would pay for HHR's mistake. Shearson did not learn of HHR's continued representation of Houston Biotech until discovery in this action.

Shearson properly opposed HHR's jurisdictional challenge in the trial court, preserving this issue for review by this Court. Appendix F at 25a (without exhibits).

REASONS FOR GRANTING THE WRIT

Despite the fact that HHR's wrongful conduct was necessarily focused toward Texas and resulted in regulatory action by the Texas Securities Board, forcing the rescission offer in Texas that caused Shearson's damages, and despite the fact that this action is replete with complicated questions of Texas law and regulations, Texas courts have said that HHR is beyond the constitutional limits of their jurisdiction.

What is even more troubling, however, is that this action establishes a precedent that undermines this Court's description of the constitutional boundaries by foreclosing local courts from redressing errors by out-of-state lawyers, even when they purposefully provide legal advice and representation about state and local legal matters (causing, as HHR did, disastrous regulatory problems), and even when they represent local clients (as HHR did with Houston Biotech). This is a far too narrow reading of the constitutional limits on jurisdiction and constitutes a dangerous precedent.

The problem with this precedent is not that it misstates the relevant legal principles. The general rubrics are faithfully restated -- that, however, makes this precedent only more troubling. As this Court has noted, the constitutional boundaries are not marked by "mechanical" tests, but instead have been exemplified by application of the known standards to specific fact patterns. *See International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478-79 (1985); *Calder v. Jones*, 465 U.S. 783, 790 (1984)("imprecise inquiry"). Any first-year law student can recite the rule of *International Shoe*, but application of that rule can confound even the most seasoned jurist. Thus, in the jurisdictional context, the specific facts of this case provide the precedential value of the opinion.

Application of the general principles also requires an appreciation of our ever changing world, in this instance the increasing ease and frequency of persons and companies engaging in business across states lines and, concurrently, the ease in which they can defend themselves when their activities cause damage beyond the state of their residence.[3] As the nature of legal practice in this country continues to evolve along with expanding technology and our ever more integrated economy, more and more law firms are establishing national practices, from which advice about Texas law and representation in Texas courts and before Texas' regulatory agencies can be, is, and will be provided by lawyers from any number of cities and states and even countries. With emerging communications abilities, a lawyer will be able to practice law in Texas or elsewhere from Hilton Head, the Colorado Rockies, or even Bora Bora. The same factors will mean that large companies, headquartered elsewhere but with extensive business activities in Texas (like Shearson), will be hiring these non-Texas lawyers to

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[3] *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980)("The limits imposed on state jurisdiction by the Due Process Clause, in its role as the guarantor against inconvenient litigation, have been substantially relaxed over the years ... this trend is largely attributable to a fundamental transformation in the American economy.")(citation omitted); *McGee v. International Life Insur. Co.*, 355 U.S. 220, 223 (1957)("With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."); *Hanson v. Denkla*, 357 U.S. 235, 250-51 (1958)("As technological progress has increased the flow of commerce between the States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome.").

represent them in Texas and to advise them about Texas law to guide their Texas activities. The same will be true in every state.

Under the precedent set by the Houston Court of Appeals, however, Texas and other state courts will lack the jurisdiction to control this expanding practice of law that intimately affects their economy and laws. Even this case is an example of the serious implications of allowing lawyers from another state to provide legal representation and advice without the supervision of local courts: HHR's arrogant belief that it understood Texas' regulatory requirements sufficiently to spearhead the Houston Biotech offering resulted in the collapse of a $5.4 million securities offering in Texas that was meant to fund the research of a Texas medical company. Houston Biotech and Shearson were absolutely subject to the regulatory jurisdiction of the Texas Securities Board, but, unless the court of appeals' decision is reversed, Shearson's agent and self-proclaimed expert directing the Texas blue sky aspects of the offering, HHR, which caused the problem, will escape even an assessment of its responsibility. Indeed, under the court of appeals' decision, an unlicensed lawyer from another state or country who appears (both physically and via letter, phone and fax) and provides supposedly expert advice directly affecting the local economy will have far greater protection from liability and disciplinary action than a locally licensed lawyer who conducts the same activity. In fact, under the current opinion, HHR is even immune from Texas' jurisdiction for its breaches of the ethical rules governing the practice of law in Texas.

That HHR sought to represent Shearson before a state regulatory agency and to advise Shearson regarding state regulations *from another state* should heighten Texas' and this Court's concern about that conduct, not diminish it to the

point of non-interest. An inescapable fact of modern life is that more and more "national" law firms will be seeking to enter local markets, and more and more companies will be acting on their advice, with potentially severe consequences.

The Texas-centered nature of this action should also not be obscured by the fact that Shearson is legally based in New York. Without question, Shearson has a significant presence in most states, including Texas, and in this matter in particular was hired to raise funds for a Texas biotechnology company and, as a result of its lawyers' malpractice, was required by the Texas Securities Board to rescind a multi-million dollar offering in Texas -- and only Texas. HHR should no more be able to avoid Texas' jurisdiction over this problem than its client, Shearson. Indeed, there is nothing relevant about this matter that relates to any other state: the offering, the advice, and the damage are all centralized in Texas.

One indication that Shearson's allegations support jurisdiction is the meaning of any ultimate judgment (wherever obtained) against HHR. If Shearson obtains a judgment against HHR for the $5.4 million it spent for the Texas rescission (in any court of any state) that judgment can be based only on HHR's contacts in and related to Texas.

In short, this is a legal malpractice action involving incorrect advice regarding Texas law that caused a multi-million dollar securities problem in Texas, which had to be addressed at great expense by the Texas Securities Board. Texas' interests are preeminent. More importantly, the problem is sure to arise again: on a daily basis, large companies are being advised regarding their multi-million dollar transactions across the nation by a host of New York, California, and beltway lawyers, unregulated under this precedent by any court or state bar, and motivated not by

any special regard for the state in which they are practicing but by the prospects of making a profit. Local courts and bars should not avoid judicial oversight of the practice of law that so intimately affects their states and communities, particularly because of a misunderstanding of the reach of the federal Constitution, nor should legal malpractice be committed with impunity merely because the lawyers committing it have not sworn loyalty to a particular state or its laws.

The legal standards

Although the standards for determining questions of personal jurisdiction are well established, assessing a particular case in light of those standards remains an imprecise task of weighing specific facts against broad principles. Under Texas and federal law, jurisdiction can be exercised over HHR unless to do so would be unfair to an unconstitutional degree. As this Court has noted, Texas extends personal jurisdiction to the full limits of the United States Constitution. *Hall v. Helicopteros Nacionales De Columbia, S.A.*, 638 S.W.2d 870 (Tex. 1982), *reversed on other grounds sub.* nom., 466 U.S. 408 (1982).

In order to fulfill that minimal requirement, Shearson's claims need only "arise out of or relate to" HHR's purposeful contacts with Texas. *Helicopteros*, 466 U.S. at 414; *Keeton* 465 U.S. at 774.

The Texas courts correctly stated the relevant legal rule, but erred in analyzing the facts and Shearson's claims.

The malpractice claim

The core of Shearson's malpractice claim is that it hired HHR to do the blue sky work for the Houston Biotech

offering and that HHR botched the job in Texas, causing Shearson to expend over $5.4 million to rescind the Texas offering.

HHR admits that it had some responsibility for the Texas registration; HHR disclaims only that it was responsible for the oversale and its ultimately catastrophic consequences. HHR concedes that it "was involved in representing Hutton and in attempting to register these securities in the 50 states, including Texas," and that it "had some correspondence with the Texas Securities Board to answer questions about the offering."

The lower courts improperly reached the merits of Shearson's claims.

The decision of the court of appeals and the findings of the trial court (penned by HHR) likewise confirm that HHR purposefully established contacts with Texas when it agreed to handle the Texas registration, that it profited from those activities, and even (implicitly) that HHR could reasonably anticipate being haled into a Texas court as a result of its being hired to handle the Texas registration. Yet, both courts determined *on the merits* that, "[a]lthough HHR did have some contact with Texas during the creation of Houston Biotech Partners and the registration process, Shearson's claims did not arise until long after the registration process was complete." Appendix C at 16a.

Once HHR admits to its Texas responsibilities, however, the question of whether it properly fulfilled those duties goes solely to the merits of Shearson's claims and is irrelevant to the jurisdictional question. Of course, HHR disagrees that it had the duty to prevent the deadline from running. If it openly admits otherwise, it might as well get out its checkbook. Its desire to avoid that admission on the

merits, however, expressed in alleged limits on the scope of its engagement, does not eliminate Texas jurisdiction over Shearson's claims.

HHR subjected itself to jurisdiction in Texas (at least as to any dispute about its services in Texas) when it agreed to perform legal services in that State. HHR was Hutton's sole blue sky counsel in Texas, and HHR was amply paid to ensure that the Houston Biotech securities were fully and properly registered in Texas. Shearson's malpractice claim challenges HHR's performance, and Shearson is entitled to its day in court on that challenge. Whether HHR's responsibilities encompassed the oversale and its cure, and thus whether HHR committed malpractice, is a question of liability, not jurisdiction.

The jurisdictional determinations of the lower courts rest on a particular view of the merits of the critically disputed aspects of Shearson's claims, which should be decided by the jury, not an appellate or trial court relying on abbreviated proof. In fact, the opinion of the court of appeals depends on two *merits* rulings: (a) that HHR's task was limited to the initial registration, and (b) that HHR successfully completed that limited task (or at least no omission by HHR in finishing that work contributed to Shearson's claims).

The proper jurisdictional inquiry, however, is *not* what is the *answer* to these questions, but whether these *questions* are *sufficiently connected to Texas* that a Texas jury should answer them. There is certainly evidence presented below upon which a Texas jury could find both that (a) HHR was hired to handle the entire registration in Texas, from initial application to final sales report, and (b) HHR failed in that task. If a jury so held, it would necessarily also find the factual prerequisites for jurisdiction over HHR -- HHR

agreed to represent Shearson before the Texas regulators and failed in that task. HHR's advice concerning the cure deadline could have related to nothing other than HHR's representation of Shearson/Hutton in regard to the Houston Biotech offering in Texas; that is how HHR learned of the problem, and that is why HHR advised Shearson concerning the problem.

This Court has never addressed the sometimes confusing relationship between the merits of a plaintiff's claims and the court's jurisdiction over the defendant or the limits of the factual analyses to be taken by a lower court in making such determinations. *See, e.g., Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671, 677 (1st Cir. 1992).

The lower courts erred in analyzing the nature of the attorney/client relationship.

The lower courts also erred in analyzing the relationship between Shearson and HHR, which in turn brought the court of appeals to its erroneous conclusion that HHR's "legal advice was sold only to Shearson in New York." Appendix C at 14a. HHR was not merely some peddler of legal advice; HHR's blue sky lawyers *represented* Shearson before the Texas Securities Board and directly communicated with the regulators here in behalf of Shearson.

The distinction is critical: an attorney is not a merchant. Under Texas law, an attorney does not sell a product in the strict sense; the relationship of an attorney and a client is an agency relationship. *E.g., Portnow v. Berg*, 593 S.W.2d 843, 845 (Tex.Civ.App. -- Houston [1st Dist.] 1980, no writ). That is, HHR was Shearson's agent before the Texas State Securities Board, and as a result of HHR's admittedly national blue sky practice, HHR acted as agent of each of its clients in Texas on a regular basis. HHR

concedes that Texas is a critical state in almost every blue sky registration.

In regard to the Texas blue sky process, Shearson needed representation only in Texas, not California or New York. It was solely and necessarily HHR's conduct as Shearson's agent before the Texas Securities Board that resulted in Shearson's being required by that Board to rescind the entire Texas offering.

The lower courts ignored the reasonably foreseeable results of HHR's advice.

Also resting on the court of appeals' conclusion that HHR's "defective advice regarding the cure of the oversale was directed at Shearson in New York and not at Texas" is the court's rejection of specific jurisdiction based on the reasonably foreseeable effects of HHR's advice in Texas. Appendix C at 18a. The court of appeals' error in this regard tracked that of the trial court, which found that "[i]n connection with the oversale problem . . . HHR did not intentionally cause any effect in Texas."

Again, the court's analysis is too narrow. The critical element is not where Shearson physically received HHR's advice (Shearson has offices worldwide), but instead where Shearson was foreseeably going to act (or not act) on the advice. HHR's advice to Shearson regarding the oversale and when to file the final sales report could only have been intended to direct Shearson's (and HHR's, as Shearson's and Houston Biotech's agent) activities in Texas. This was not a hypothetical question, designed to satisfy the curiosity of a New York executive. HHR knew, as Shearson's agent for the Texas blue sky registration, that Shearson needed its legal advice in order to act properly in Texas. HHR advised Shearson how to act in Texas, but did so inadequately,

causing a significant and eminently foreseeable consequence here. Thus, the advice had to have been directed at Texas.

The results of that advice were also foreseeable and foreseen. Gordon Kanofsky, the principal HHR attorney involved in the Houston Biotech offering, admitted that his "initial reactions and concerns" about the Texas oversale were "the possibility that the state regulators would take the view that the investors who had purchased those securities might be able to have the right to rescind their purchase of securities." The record confirms that Kanofsky never conveyed that concern until the deadline for avoiding rescission had expired. So, not only was the Texas rescission foreseeable, HHR actually did foresee that eventuality, and that eventuality came to pass.

To subject itself to jurisdiction in Texas, the defendant need only take some action from which a reasonable foreseeable result occurring in Texas can be inferred. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984); *Calder*, 465 U.S. at 789-90.

The lower courts erred by requiring, not just that HHR intentionally have directed activities at this State, but that it have intended to cause the result that occurred. The test is not so limited. For example, if a person intentionally shoots at a bird across the Oklahoma/Texas state line, but hits a child instead, Texas courts would have jurisdiction based on the defendant's intentional conduct directed at Texas (the shot) and the reasonably foreseeable result (that the defendant could miss and hit something else). Texas jurisdiction would not depend on whether it was murder. Perhaps even more analogous: if a hunting guide negligently instructed a child in Oklahoma to shoot at a bird in Texas, with the same unwanted consequences, that guide should be subject to jurisdiction in this State for causing a reasonably foreseeable result here.

In effect, the precedent set by the lower courts would limit effects-based jurisdiction to intentional torts. Those committing negligence could not be touched.

Shearson's New York headquarters is irrelevant to the jurisdictional inquiry.

The trial and appellate courts were preoccupied with Shearson's New York base.[4] Although no one denies that Shearson's activities span the country, and in this case predominated in Texas, the lower courts repeatedly emphasized Shearson's New York home.

This emphasis was misplaced. This Court has noted that a plaintiff's residence is of very limited importance in determining jurisdiction over the defendant. *See, e.g., Shaffer v. Heitner*, 433 U.S. 186, 204 (1977); *Rush v. Savchuk*, 444 U.S. 320, 332 (1980); *Keeton*, 465 U.S. 770. The proper jurisdictional inquiry "focuses on 'the relationship among the *defendant*, the forum, and the litigation.'" *Keeton*, 465 U.S. at 775 (*quoting Shaffer*, 433 U.S. at 204) (emphasis added). As noted in *Keeton*, although the "plaintiff's residence is not, of course, completely irrelevant to the jurisdictional inquiry," its primary significance is that it may "enhance the defendant's contacts with the forum." *Id.* at 780. "But plaintiff's residence in the forum state is not a separate requirement, and lack of residence will not defeat jurisdiction established on the basis of defendant's contacts." *Id.*

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[4] The trial court in particular has demonstrated a proclivity for dismissing actions by out-of-state plaintiffs. *See General Electric Co. v. Brown & Ross Int'l Distrib.*, Inc., 804 S.W.2d 527 (Tex.App. -- Houston [1st Dist.] 1990, writ denied)(reversing dismissal for want of personal jurisdiction by same court and Judge as in this case below.).

The lower courts ignored HHR's self-proclaimed national blue sky practice.

Even if HHR's advice concerning the Texas oversale could be analyzed apart from the rest of the Houston Biotech offering, it cannot be viewed apart from HHR's national blue sky practice. Even if a California lawyer's "one shot" advice concerning Texas law would not subject that attorney to suit in Texas, HHR's advice to Shearson was not a "one shot" proposition. HHR has purposefully created and promoted a national blue sky practice, which necessarily includes advice concerning and affecting Texas law.

A defendant that markets itself nationally is subject to jurisdiction wherever its product foreseeably causes harm. *World-Wide Volkswagen*, 444 U.S. at 297-98; *Keeton*, 465 U.S. 770. In *World-Wide Volkswagen*, this Court held that, if the sale "is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to gain directly or indirectly, the market for its product in other states, it is not unreasonable to subject it to suit in one of those states if its allegedly defective merchandise has there been a source of injury . . . ." 444 U.S. at 297.

HHR's "product" (indulging the court of appeals' inadequate buyer-seller analogy) is its legal advice and representation concerning blue sky matters, and HHR unquestionably markets that "product" in all 50 states. In this case, HHR's product was defective and caused Shearson injury here. It is hardly unfair that HHR be required to defend itself here; certainly HHR had no difficulty in charging Shearson for its advice concerning Texas law or for its several trips here for the Houston Biotech offering.

Shearson's breach of fiduciary duty and contract claims

The core of these claims lies in HHR's divided loyalties before the cure problem arose. HHR's conflict began when Shearson took over Hutton, which both threatened HHR's future blue sky work and created a potential conflict of interest between HBI and Shearson, both of whom were represented by HHR. In fact, HHR recognized the potential for conflict between HBI and Shearson immediately, and promised to cease representation if such a conflict arose.

As predicted by HHR, a conflict did arise -- the question (prior to the deadline) of who was going to pay the $15,000 fee for the oversale cure.

When the conflict arose, HHR chose sides: when Shearson instructed HHR to instruct Houston Biotech to pay the remedial fee, HHR ignored that instruction, and instead recommended to its other client (Houston Biotech in Texas) that it pay no more than one third of the fee. The resulting impasse was not resolved before the deadline expired. In fact, HHR never even informed Shearson that Houston Biotech would not pay the fee; the last Shearson knew before the deadline ran was its instruction to HHR to get the fee paid by Houston Biotech.

As a result of HHR's conflicting communications to its clients with conflicting interests, the deadline passed without the fee being paid.

The lower courts' analysis ignores HHR's representation of *Houston Biotech* regarding the oversale *in conflict with Shearson*. While all of HHR's advice regarding the oversale was intended to affect activities in Texas (what to do before the Texas regulatory agency), HHR's advice to

Houston Biotech was actually delivered *to Houston, Texas*. This advice helped cause the problem, because HHR, in violation of its instructions from, and in violation of its fiduciary duty to, Shearson, its ostensible client, gave different advice to its other client, Houston Biotech, to Shearson's detriment, on an issue in which their interests conflicted. Of note: HHR charged *Shearson* for its calls to Houston Biotech (in Houston) during this same period.

In fact, the whole oversale problem had its genesis in this potential conflict. When HHR advised Shearson to register a small amount of securities in Texas, HHR was saving Houston Biotech money, not Shearson, because Houston Biotech had the burden of paying those fees.

The predicate of the fiduciary duty claims (including for breach of contract) is HHR's representation in Texas of a Texas company. Shearson is entitled to its day in court to assert that claim.

The lower courts also ignored the facts that HHR (a) failed to inform its client Shearson that John Crary (the Hutton/Shearson employee who selected HHR for the blue sky work) was planning to leave Shearson for Houston Biotech, despite his signing for Shearson the important agreements between the Houston Biotech entities and Shearson, or even (b) that HHR was charging Shearson for work done in behalf of Houston Biotech and Crary, namely Crary's consulting agreement with Houston Biotech. Even if Shearson's claims were limited to HHR's disclosure in Texas of Shearson's privileged communications (and they are not),[5] Shearson would be entitled to assert that claim in

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[5] HHR also disclosed confidential communications when its told Houston Biotech representatives in Houston that it had informed Shearson that HHR believed that Houston Biotech should not be forced

Texas. Even after its own narrowing of Shearson's claim on this point, the court of appeals denied jurisdiction, again, based on its assessment of the merits of that claim -- that a post-deadline disclosure did not cause Shearson's damage. As before, it was wrong to approach the merits at all and wrong in the way it decided them.

CONCLUSION

When Shearson was confronted with a threat of enforcement action by the Texas Securities Board because of the Texas oversale problem, it had no choice but to defend itself in Texas. It did so, while its lawyers, who had caused the problem by failing to give Shearson complete advice, sought behind its back to saddle Shearson with that liability. Now, all Shearson requests is its day in court to prove that HHR caused it to be standing before the Texas Commissioner. It is only fair. It is certainly constitutional.

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to pay the full remedial fee.

Petitioners respectfully pray that his petition for writ of certiorari be granted.

Respectfully submitted,

Wynne & Maney

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(Counsel of Record)

Mark Maney

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Counsel for Petitioners, Shearson Lehman Brothers, Inc. f/k/a Shearson Lehman Hutton, Inc. and Shearson Lehman Brothers Holdings, Inc. f/k/a Shearson Lehman Hutton Holdings, Inc.

APPENDIX A

September 11, 1992

Mr. Mark Maney
Wynne & Maney
2730 Texas Commerce Tower
Houston, Texas 77002-2913

Mr. Parker C. Folse, III
Susman Godfrey
5100 First Interstate Bank Plaza
1000 Louisiana
Houston, Texas 77002-5096

Re: Cause No. 91-38067; Shearson Lehman Brothers, Inc., f/k/a Shearson Lehman Hutton, Inc. and Shearson Lehman Brothers Holdings, Inc., f/k/a Shearson Hutton Holdings, Inc. vs. Hughes, Hubbard & Reed; 152nd District Court of Harris County, Texas

Dear Counsel:

By this time you must have thought that the Court had gone on vacation after hearing such good arguments. However, we have made every effort to comb through the authorities as given and the arguments and what testimony was permissible before the Court, and have come to the decision that the case should be removed to a New York forum.

In any event, the contacts made by the defendant firm are not such to justify jurisdiction in a Texas court. It is the finding of the Court that it does not have personal jurisdiction over defendant HH&R, and the motion presented and argued, objecting to personal jurisdiction, is granted.

Again, many thanks for a well-presented, scholarly and gentlemanly approach to the entire problem.

Sincerely,

Jack O'Neill
Judge, 152nd District Court

JON:dpk

APPENDIX B

91-038067

SHEARSON LEHMAN BROTHERS,	§	IN THE
INC. f/k/a SHEARSON	§	DISTRICT
LEHMAN HUTTON, INC. and	§	COURT
SHEARSON LEHMAN BROTHERS	§	OF
HOLDINGS, INC. f/k/a	§	
SHEARSON LEHMAN HUTTON	§	HARRIS
HOLDINGS, INC.	§	COUNTY
Plaintiffs,	§	TEXAS
	§	
v.	§	
	§	152ND
HUGHES HUBBARD & REED	§	JUDICIAL
Defendant.	§	DISTRICT

ORDER

The Court has carefully considered the Special Appearance of defendant Hughes Hubbard & Reed to challenge the personal jurisdiction of the Court, as well as the pleadings, the relevant record, and the arguments of counsel in open court. Based upon that consideration, the Court hereby GRANTS defendant's motion. It is, therefore, ORDERED that plaintiff's suit is dismissed for lack of personal jurisdiction over the defendant.

IT IS SO ORDERED.

SIGNED this 16th day of September, 1992.

/s/ Jack O'Neill
THE HONORABLE JACK O'NEILL
DISTRICT JUDGE

APPENDIX C

SHEARSON LEHMAN BROTHERS, INC., INC.,f/k/a Shearson Lehman Hutton, Inc., and Shearson Lehman Brothers Holdings, Inc., f/k/a/ Shearson Lehman Hutton Holdings, Inc., Appellants,

v.

HUGHES, HUBBARD, & REED, Appellee,

No. 01-92-01114-CV.

Court of Appeals of Texas, Houston (1st Dist.).

June 1, 1995.

Rehearing Overruled July 13, 1995.

New York-based investment banking company sued New York based law firm, for malpractice in connection with offering of Texas limited partnership interest, and large oversale of securities in Texas, which necessitated company rescission of Texas offering. Law firm made special appearance to contest personal jurisdiction. The 152nd District Court, Harris County, Jack O'Neill, J., dismissed, holding that contacts of law firm were insufficient to support exercise of personal jurisdiction, and investment banking company appealed. The Court of Appeals, Andell, J., held that Texas court could not exercise general or specific jurisdiction over law firm.

Affirmed.

1. Appeal and Error 840(2)
Courts 35

During special appearance hearing, nonresident defendant has burden of proof to negate all bases of personal jurisdiction; and on appeal, Court of Appeals will review all the evidence in the record to determine if nonresident met this burden.

2. Securities Regulation 11.10

To offer limited partnership interests for sale nationally, securities must first be registered with the SEC and with the appropriate state regulatory authority for every state in which the securities are to be sold.

3. Constitutional Law 305(5)
Courts 12(2.1)

A Texas court may exercise jurisdiction over a nonresident if: the Texas long-arm statute authorized the exercise of jurisdiction, and the exercise of jurisdiction is consistent with federal and state constitutional guarantees. U.S.C.A. Const.Amend. 14; V.T.C.A., Civil Practice & Remedies Code § 17.042.

4. Courts 12(2.15)

Texas long-arm statute authorizes exercise of jurisdiction over nonresident "doing business" in Texas; the broad language of the statute's "doing business" requirement permits the statute to reach as far as the federal constitutional requirements will allow. V.T.C.A., Civil Practice & Remedies Code § 17.042.

5. Constitutional Law 305(5)

Federal constitutional requirements of due process limit the power of the state to assert personal jurisdiction over nonresident defendant; and due process requirement is divided into two parts; whether nonresident defendant has purposely established minimum contacts with forum state; and if so, whether the exercise of personal jurisdiction comports with "fair play and substantial justice." U.S.C.A. Const.Amend. 14.

6. Constitution Law 305(5)

Minimum contacts analysis, in considering whether the exercise of personal jurisdiction over a nonresident defendant comports with due process, requires determination of whether the nonresident defendant has purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws; this "purposeful availment" requirement ensures that nonresident defendant will not be haled into a jurisdiction based solely upon random, fortuitous, or attenuated contacts, or the unilateral activity of another party or third person. U.S.C.A. Const.Amend. 14.

7. Courts 12(2.5)

General personal jurisdiction may be asserted when the cause of action does not arise from, or relate to, the nonresident defendant's purposeful conduct within the forum state, but there are continuous and systematic contacts between the nonresident defendant and the forum state.

8. Courts 12(2.5)

When general personal jurisdiction is asserted over a nonresident defendant, the minimum contacts analysis requires showing of substantial activities in the forum state.

9. Courts 12(2.25)

New York law firm was not subject to general personal jurisdiction in Texas, even though it had "national Blue Sky practice," and provided legal advice concerning blue sky matters in all 50 state, where plaintiff in malpractice case provided no evidence to support claim that law firm marketed its legal services on national scale, there was no evidence that law firm marketed its legal services anywhere other than where its offices were located, law firm's legal advice was sold to investment banking company only in New York, and only product sold nationally was limited partnership interests in offering.

10. Courts 12(2.10)

For specific personal jurisdiction to be asserted, cause of action must arise out of or relate to nonresident defendant's contact with the forum state in order to satisfy the minimum contacts requirement; the contact must have occurred as a result of nonresident defendant's purposeful conduct, and not the unilateral activity of the plaintiff or others.

11. Courts 12(2.25)

New York law firm was not subject to specific personal jurisdiction in Texas in malpractice case brought by investment banking company that underwrote securities offering, even though law firm made two trips to Texas, and

communicated by telephone, mail, and fax with Texas regulatory agencies, personnel of partnership of which securities were being offered, and Texas law firm, where investment banking company's claims based on oversale of securities in Texas and failure to cure oversale prior to statutory deadline, did not arise until long after registration process was closed, fact that investment banking company sold more of securities in Texas than had been registered did not negate validity of initial registration work performed by law firm, all communications between law firm and investment banking company regarding Texas oversale, took place in and between California and New York and all of law firm's acts or omissions relating to its research occurred in law firm's Los Angeles office. U.S.C.A. Const.Amend. 14; Vernon's Ann.Texas Civ.St. Art. 581-7, subd. A(1).

12. Courts 12(2.25)

Alleged foreseeability of consequences of allegedly negligent legal advice, given to New York client, within forum state, and regarding Texas law, did not support exercise of specific personal jurisdiction over New York law firm by Texas court. U.S.C.A. Const.Amend. 14.

13. Constitutional Law 305(5)

Foreseeability of consequences within forum state has never been sufficient benchmark for personal jurisdiction under federal due process; foreseeability has been held to be enough only in those cases in which the nonresident defendant could or should have foreseen consequences that occurred within the forum state because the consequences were the result of the defendant's intentional conduct directed at the forum state. U.S.C.A. Const.Amend. 14.

14. Attorney and Client 109

Client, an investment banking company, could not maintain suit against law firm for breach of fiduciary duty in connection with oversale of securities which necessitated rescission of offering in state, even though law firm disclosed communications between investment banking company and law firm to business partner in partnership for which securities were being offered without obtaining permission for investment banking company prior to doing so, where disclosure occurred well past point at which oversale of securities could have been cured, and thus could not serve as basis for claim against law firm on issue of the oversale.

Kenneth R. Wynne, Mark Maney, Gregory A. Pierce, Houston, for appellants.

Parker C. Folse, III, Houston, for appellee.

Before ANDELL and HUTSON-DUNN, JJ., and DUGGAN,* Justice (Retired).

OPINION

ANDELL, Justice.

This is an appeal from the trial court's granting of the special appearance of appellee, Hughes, Hubbard & Reed (hereinafter HHR). Appellants, Shearson Lehman Brothers, Inc. and Shearson Lehman Brothers Holdings, Inc.

* Justice Duggan, who retired on December 31, 1994, continues to sit by assignment for the disposition of this case, which was submitted prior to that date.

(collectively Shearson), contend that trial court erred when it dismissed their malpractice and breach of fiduciary duty claims against HHR. We are presented with the issue of whether HHR's contacts with the State of Texas were sufficient to establish personal jurisdiction. We hold that they were not, and affirm the trial court's dismissal.

Standard of Review

[1] During a special appearance hearing, a nonresident defendant has the burden of proof to negate all bases of personal jurisdiction. *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 203 (Tex.1985); *Project Eng'g USA v. Gator Hawk*, 833 S.W.2d 716, 719 (Tex.App.— Houston [1st Dist.] 1992, no writ). On appeal this Court will review all the evidence in the record to determine if the nonresident met this burden. *General Elec. Co. v. Brown & Ross Int'l Distrib., Inc.*, 804 S.W.2d 527, 529-30 (Tex.App.— Houston [1st Dist.] 1990, writ denied).

Facts

E.F. Hutton & Co., Inc. (Shearson's predecessor in interest), an investment-banking company based in New York City, agreed to underwrite an offering for its client, Houston Biotech, Inc. (HBI). To this end, HBP, a separate limited partnership, was created by HBI and Hutton, and HBP securities in the form of limited partnership interests were registered and offered publicly nationwide. The "blue sky" section of HHR's Los Angeles office was retained by Hutton personnel in New York to act as legal counsel in the creation of HBP and the registration process. HHR is a law firm based in New York City with offices in New York, Los Angeles, Washington, D.C., Miami, and Paris.

[2] To offer securities for sale nationally, the securities must first be registered with the SEC and with the appropriate state regulatory authority for every state in which the securities are to be sold. HHR was responsible for registering HBP's limited partnership interests nationally, including in Texas. After the HBP offering closed, it was discovered that a large oversale of HBP securities had occurred in Texas. Although Texas law provided a remedy for curing an oversale,[1] the statutory deadline for effecting such a cure passed without any action being taken. Shearson complains that they were forced to rescind the Texas offering as a result of HHR's legal malpractice and HHR's breach of their fiduciary duty to Shearson.

It is Shearson's contention that HHR's contacts with Texas, as set out in the record, were sufficient to establish both general and specific jurisdiction. The facts relied upon by Shearson in support of their claims are: (1) the nature of HHR's "blue sky" legal practice; (2) the agreement between Shearson and HHR that HHR would be responsible for the registration of the securities; (3) three trips made by HHR personnel to Texas and; (4) various communications by HHR personnel with individuals and state agencies in Texas.

Exercise of jurisdiction by a Texas court

[3] A Texas court may exercise jurisdiction over a nonresident if: (1) the Texas long-arm statute authorizes the exercise of jurisdiction; and (2) the exercise of jurisdiction is consistent with federal and state constitutional guarantees.

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[1] 68th Leg., R.S. ch. 238, § 81, 1985 Tex.Gen. Laws 1179, 1201, *amended by* Act effective September 1, 1987, 70th Leg., R.S. ch. 732, § 2 1987 Tex.Gen.Laws 2638, 2639-40 (current version at TEX.REV.CIV.STAT.ANN. art. 581-35 E (Vernon 1991).

Schlobohm v. Schapiro, 784 S.W.2d 355, 356 (Tex.1990); *General Elec. Co.*, 804 S.W.2d at 530.

The Texas long-arm statute

[4] The Texas long-arm statute authorized the exercise of jurisdiction over a nonresident "doing business" in Texas. TEX.CIV.PRAC. & REM.CODE ANN. § 17.042 (Vernon Supp.1995). The broad language of the statue's "doing business" requirement permits the statute to reach as far as the federal constitutional requirements will allow. *Guardian Royal Exch. Assurance v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (Tex.1991). Therefore, we need only consider whether it is consistent with federal constitutional requirements of due process for Texas courts to assert in personam jurisdiction over a nonresident defendant. *Id.* at 226.

Federal constitutional due process

[5] Federal constitutional requirements of due process limit the power of the state to assert personal jurisdiction over a nonresident defendant such as HHR. *Helicopteros 'Nacionales de Colombia v. Hall*, 466 U.S. 408, 413-14, 104 S.Ct. 1868, 1871-72, 80 L.Ed.2d 404 (1984). The United States Supreme Court divides the due process requirement into two parts: (1) whether the nonresident defendant has purposely established minimum contacts with the forum state; and (2) if so, whether the exercise of jurisdiction comports with "fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76, 105 S.Ct. 2174, 2183-84, 85 L.Ed.2d 528 (1985).

[6] Minimum contacts analysis requires a determination of whether the nonresident defendant has

purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Guardian Royal*, 815 S.W.2d at 226. This "purposeful availment" requirement ensures that a nonresident defendant will not be haled into a jurisdiction based solely upon "random," "fortuitous," or "attenuated" contacts or the "unilateral activities of another party or third person." *Id.* at 226 (citing *Burger King*, 471 U.S. at 472, 105 S.Ct. at 2183). Minimum contacts analysis has been further refined into general and specific jurisdiction.

(1) General jurisdiction

[7,8] General jurisdiction may be asserted when the cause of action does not arise from, or relate to, the nonresident defendant's purposeful conduct within the forum state, but there are continuous and systematic contacts between the nonresident defendant and the forum state. *Guardian Royal*, 815 S.W.2d 223, 228; *Schlobohm* , 784 S.W.2d at 357. When general jurisdiction is asserted, the minimum contacts analysis requires a showing of substantial activities in the forum state. *Id.*

[9] Shearson asserts that HHR maintained continuous and systematic contacts with Texas. They contend that by virtue of its "national Blue Sky practice," HHR subjected itself to jurisdiction in any state where it provided advice concerning that state's laws. Shearson argues that HHR markets its "product" (i.e., its legal advice concerning "blue sky" matters) in all 50 states. Since its product, HHR's advice concerning Texas law, was "defective", Shearson maintains that jurisdiction is proper in Texas. We disagree.

In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98, 100 S.Ct. 559, 567, 62 L.Ed.2d 490

(1980), the Supreme Court held that "if the sale of a product ... arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its products in other states, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others." Likewise, the Supreme Court in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781, 104 S.Ct. 1473, 1481, 79 L.Ed.2d 790 (1984) held that when the respondent magazine had "continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine."

Although Shearson contends that these cases are controlling, we disagree. Shearson confuses the idea of nationally marketing a product, as in *World-Wide* and *Keeton*, and marketing a product such as legal advice on state blue sky laws, that is national in scope. Shearson provides no evidence to support their claim that HHR marketed its legal services on a national scale. In fact, there is no evidence to show that HHR marketed its legal services anywhere other than where its offices were located. The product that was sold nationally in this case was HBP in the form of limited partnership interests. HHR's legal advice was sold only to Shearson in New York. Therefore, Shearson has failed to show how HHR's having a "national blue sky" practice can support a finding of general jurisdiction.

In *Billingsley Parts and Equipment, Inc. v. Vose*, 881 S.W.2d 165, 169 (Tex.App.— Houston [1st Dist.] 1994, writ denied), we held that a nonresident defendant, who initiated contact with a Texas company, made numerous phone calls to them over a period of one year, and was paid commissions by checks drawn on a Texas bank, did not have systematic and continuous contacts with Texas sufficient to support a

finding of general jurisdiction. *Id.* at 169. An examination of the contacts between HHR and Texas clearly shows that they were far more limited than those rejected by this court in *Billingsley*. Therefore, we hold that HHR's contacts with Texas were not so systematic or continuous to serve as the basis for general jurisdiction in a Texas court.

[2] Specific jurisdiction

[10] For specific jurisdiction to be asserted, the cause of action must arise out of or relate to the nonresident defendant's contact with the forum state in order to satisfy the minimum contacts requirement. *Guardian Royal*, 815 S.W.2d at 227. The contact between the nonresident defendant and the forum state must have occurred as a result of the nonresident defendant's purposeful conduct and not the unilateral activity of the plaintiff or others. *Id.* at 227.

> Furthermore, the nonresident defendant's activities must have been "purposefully directed" to the forum and the litigation must result from alleged injuries that "arise out of or relate to" those activities. When specific jurisdiction is asserted, the minimum contacts analysis focuses on the relationship among the defendant, the forum and the litigation.

Guardian Royal, 815 S.W.2d at 228 (citations omitted).

[11] Shearson contends that its claim arise out of HHR's purposefully directed contacts with Texas. However, Shearson is mistaken. Although HHR did have some contact with Texas during the creation of HBP and the registration

process,[2] Shearson's claims did not arise until long after the registration process was completed.

(a) The registration process

Shearson contends that the facts that an oversale of the HBP securities occurred in Texas,[3] and that statutory deadline for effecting a cure of the oversale passed before any action was taken to solve the problem, prove that HHR did not successfully complete its Texas registration work. Shearson argues that it was required to rescind the Texas offering because the HBP securities were not properly registered in Texas. Shearson's analysis of the situation is exactly backwards. Under Texas law, "No dealer, agent or salesman shall sell of offer for sale any securities ... *except those which shall have been registered* ...." TEX.REV.CIV.STAT. ANN. art. 581-7(A)(1) (Vernon 1964) (emphasis added). Shearson, on the advice of HHR, directed HHR to register $1 million of HBP securities in Texas and HHR successfully did so.[4] Shearson was fully aware of the amount of securities registered, and took no action to have the original registration amended. The fact that *Shearson* sold millions of dollars more of the HBP

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[2] HHR made two trips to Texas and communicated, by telephone, mail, fax, with Texas regulatory agencies, HBI personnel and Vinson & Elkins, a Texas based law firm representing HBI during the registration process.

[3] Oversales of the HBP securities also occurred in two states other than Texas.

[4] When Shearson representatives in Texas began to sell the HBP securities prior to the completion of the registration process, Shearson immediately retained a Texas law firm to act as counsel in dealing with the problems that this situation created with the Texas regulatory agencies. Shearson was well aware of when the securities were properly registered and when they were not.

securities in Texas than had been registered does not negate the validity of the initial registration.[5] We hold that Shearson's claims against HHR did not arise as a result of HHR's contacts with Texas during the registration process. Therefore, those contacts cannot serve as the basis for asserting specific jurisdiction over HHR.

b) The malpractice claim

Shearson contends that HHR committed legal malpractice and as a result, Shearson was forced to expend over $5.4 million to rescind the Texas offering. The core of Shearson's malpractice claim is that HHR failed to do any research in regards to the Texas oversale problem and therefore did not advise Shearson that there was a statutory deadline for effecting a cure. This, Shearson contends, was the direct cause for Shearson's having to make the rescission offer in Texas.

All communications between HHR and Shearson in regards to the Texas oversale, up to and beyond the passing of the deadline to cure, took place in and between California and New York. All of HHR's acts or omissions relating to its research occurred in HHR's Los Angeles office. Nevertheless, it is Shearson's contention that HHR is subject to the jurisdiction of a Texas court solely on the basis of HHR's advice to Shearson regarding the oversale.

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[5] HHR was not involved in the sale of the HBP limited partnership interests beyond registering the securities for sale and was not aware that oversales had occurred in three states until some time after the HBP offering had closed.

Foreseeability

Shearson contends that the Texas rescission was the reasonably foreseeable result of the failure of HHR to advise them of the deadline for the cure of the oversale. Therefore, Shearson claims that HHR should be subject to jurisdiction in Texas on the basis of foreseeability alone.

Shearson relies on a line of cases which hold that even if a defendant performs no physical act within the state, activities outside the state can provide adequate contacts to support jurisdiction if they have reasonably foreseeable consequences within the state. *See, e.g., General Elec. Co.*, 804 S.W.2d at 533 (citing *Siskind v. Villa Foundation for Education, Inc.*, 642 S.W.2d 434, 438 n. 5 (Tex.1982)); *see also Calder v. Jones*, 465 U.S. 783, 789-90, 104 S.Ct. 1482, 1487, 79 L.Ed.2d 804 (1984). In each of the cases cited by Shearson in which the activities of the nonresident defendant outside the forum state were found to be sufficient to support jurisdiction on the basis of their foreseeable consequences within the state, the finding of foreseeability was based on the *intentional activities* of the nonresident defendant *directed at the forum state*.

[12] This is not the case here. HHR was unaware of the existence of a deadline for curing the oversale in Texas until several weeks after the deadline had expired. In addition, the allegedly defective advice regarding the cure of the oversale was directed at Shearson in New York and not at Texas.

[13] Forseeability alone has never been a sufficient benchmark for personal jurisdiction under federal due process. *World-Wide Volkswagen*, 444 U.S. at 295, 100 S.Ct. at 566. Foreseeability has been held to be enough only in those cases in which the nonresident defendant could or

should have foreseen the consequences that occurred within the forum state because the consequences were the result of the defendant's intentional conduct directed at the forum state. Shearson has cited no law to support its contention that the negligent advice of a nonresident law firm, directed at a New York client regarding an aspect of Texas law, should subject that law firm to the jurisdiction of Texas courts. To hold that the foreseeability analysis of *General Electric* should apply in this case would greatly expand that doctrine beyond its present reach and we decline to do so.

c) The breach of fiduciary duty claim

Shearson contends that HHR represented both Shearson and Houston Biotech entities,[6] and that a conflict arose out of that dual representation. This, Shearson claims, caused HHR to neglect its duties to Shearson resulting in the passing of the deadline and the necessity of the rescission offer.

[14] The only example of HHR's breach of its fiduciary duty to Shearson, however, is that HHR disclosed communications between Shearson and HHR to the Houston Biotech entities without obtaining permission from Shearson prior to doing so. The disclosure to which Shearson refers occurred well past the point at which the oversale could have been cured and thus can not serve as the basis for a claim against HHR on the issue of the oversale.

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[6] Originally HBP's management was controlled by Hutton but when Shearson acquired and merged into Hutton it triggered the right of HBI to acquire HBP's management interest. HHR continued to represent both Shearson and the Houston Biotech entities after informing them both of the potential for future conflict and requesting permission from both to do so.

Venue notion of the trial court

Shearson complains that the trial court incorrectly applied a venue-type analysis to the facts of the case rather than the proper jurisdictional analysis. Having found that the trial court was correct in concluding that Texas courts do not have personal jurisdiction over HHR in this case, we conclude that the trial court did not err in its analysis.

Conclusion

We hold that HHR's contacts with Texas were inadequate to establish either general or specific jurisdiction in Texas under a minimum contacts analysis. In so holding, we also hold that the evidence was sufficient to support the findings of the trial court and the trial court did not impermissibly reach the merits of the case or err by failing to make additional findings.

We affirm the judgment of the trial court.

APPENDIX D

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

November 22, 1995

Mr. Kenneth R. Wynne
Wynne & Maney
2730 Texas Commerce Tower
Houston, TX 77002-2913

Mr. Mark Maney
Wynne & Maney
2730 Texas Commerce Tower
Houston, TX 77002

Mr. Parker C. Folse, III
Susman Godfrey
5100 First InterState Bank Plaza
1000 Louisiana
Houston, TX 77002-5096

RE: Case Number 95-0901

Style: SHEARSON LEHMAN BROTHERS, INC., f/k/a/ SHEARSON LEHMAN HUTTON, INC. and SHEARSON LEHMAN BROTHERS HOLDINGS, INC., f/k/a SHEARSON LEHMAN HUTTON HOLDINGS, INC. v. HUGHES, HUBBARD & REED

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied."

Sincerely,

John T. Adams, Clerk
by /s/
Courtland Crocker
Deputy

APPENDIX E

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

January 11, 1996

Mr. Kenneth R. Wynne
Wynne & Maney
2730 Texas Commerce Tower
Houston, TX 77002-2913

Mr. Mark Maney
Wynne & Maney
2730 Texas Commerce Tower
Houston, TX 77002

Mr. Parker C. Folse, III
Susman Godfrey
5100 First InterState Bank Plaza
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Houston, TX 77002-5096

RE: Case Number 95-0901
Style: SHEARSON LEHMAN BROTHERS, INC., f/k/a SHEARSON LEHMAN HUTTON, INC. and SHEARSON LEHMAN BROTHERS HOLDINGS, INC., f/k/a SHEARSON LEHMAN HUTTON HOLDINGS, INC.

v.

HUGHES, HUBBARD & REED

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

JOHN T. ADAMS, CLERK
BY: /s/ Michael C. Murphey
Michael C. Murphey, Deputy Clerk

APPENDIX F

No. 91-038067

SHEARSON LEHMAN BROTHERS	§	IN THE
f/k/a SHEARSON LEHMAN	§	DISTRICT
HUTTON, INC. and SHEARSON	§	COURT
OF LEHMAN BROTHERS HOLDINGS,	§	
INC. f/k/a SHEARSON LEHMAN	§	HARRIS
HUTTON HOLDINGS, INC.,	§	COUNTY
Plaintiffs,	§	TEXAS
v.	§	
	§	152ND
HUGHES, HUBBARD & REED	§	JUDICIAL
Defendants.	§	DISTRICT

SHEARSON'S MEMORANDUM IN OPPOSITION TO HHR'S SPECIAL APPEARANCE

Shearson Lehman Brothers, Inc, f/k/a Shearson Lehman Hutton, Inc. and Shearson Lehman Brothers Holdings, Inc. f/k/a Shearson Lehman Hutton Holdings, Inc., ("Shearson") respectfully submit this memorandum and supporting evidence in opposition to the special appearance of the defendant, Hughes, Hubbard & Reed ("HHR").

Introduction

At bottom, Shearson sues the law firm of HHR for giving it incomplete and incorrect legal advice concerning Texas' Blue Sky laws that caused the Texas State Securities Board to order Shearson to offer rescission to all Texas residents who had purchased limited partnership units in a Texas-based limited partnership. The rescission offer cost Shearson over $5.4 million, all of which it paid in Texas to Texas investors. As part of the engagement involving its bad

advice, HHR lawyers personally travelled to Houston, Texas at least three times (the third time to address the problem their bad advice had caused), telephoned to Texas, wrote to Texas, delivered applications, and reports to Texas for filing with the State Securities Commissioner, and filed reports directly with the State Securities Commissioner and the Secretary of State.

In the face of these facts, HHR challenges this Court's jurisdiction, claiming that it is fundamentally unfair to expect a national law firm (by definition practicing in all states) to defend in Texas claims involving its incorrect advice about Texas law that resulted in an enforcement action by an agency of The State of Texas. HHR necessarily also challenges this Texas Court's interest (a) in policing attorneys who provide advice concerning Texas law and (2) in determining the cause and responsibility for violations of Texas securities laws.

HHR girds its feeble position with a litany of cases that uniformly deal with one irrelevant scenario: client sues an out-of-state attorney who was hired to represent the client in the attorney's home state. Those cases simply do not apply here. In fact, they do not even come close. As HHR admits, HHR was hired by E.F. Hutton & Company Inc. ("Hutton," now Shearson) to do the state blue sky work in connection with an offering of securities by a Texas-based company. HHR's Memorandum at 7. HHR's legal advice and conduct was not limited to California or New York law -- it reached nearly every state, including Texas. Shearson sues HHR as a result of HHR's actions related to the Texas aspects of that offering, including particularly HHR's incorrect advice concerning Texas law, and HHR's breach of its fiduciary duties to Hutton and Shearson by its actions in Texas and directly affecting Hutton and Shearson in Texas.

Not only is the law HHR cites irrelevant, its recitations of fact are untrue: HHR represented Shearson in Texas, negotiated and communicated directly with governmental agencies of the State of Texas as well as private entities within Texas, and it continues even in 1992 to represent companies in Texas, including those involved in Shearson's problem here. In short, HHR practiced and continues to practice law in this State and is therefore subject to the jurisdiction of the Courts of this State for its malpractice here.

Because jurisdictional inquiries are heavily fact-intensive, this memorandum begins with discussions of HHR's contacts with this forum.

HHR's Contacts with Texas

1. HHR agreed to represent Hutton in connection with an offering of securities by a Texas-based biotechnology firm, Houston Biotechnology Incorporated or HBI. Exhibit A, excerpts of the deposition of Gordon Kanofsky, an HHR partner, at 4, 25, 26-28, 37, 49-52, 78-79; Objections and Answers of Hughes, Hubbard & Reed to Plaintiffs' First Set of Written Interrogatories ("HHR's Interrogatory Answers") at 15.

2. HHR lawyers travelled to Texas and represented Hutton in its negotiations with HBI concerning Hutton's and HBI's respective duties related to the offering. There were two "sides" for these negotiations, and HHR was clearly on the side of Hutton. Exhibit A at 83-84, 86-90; HHR's Interrogatory Answers at 15.

3. HHR drafted the resulting contract (the Sales Agency Agreement) between Texas-based HBI and Hutton, one of the terms of which required HBI to advance all blue

sky filing fees. Exhibit A at 93-94, 242-243; HHR's Interrogatory Answers at 15.

4. HHR participated in the decision that the offered securities would be units of limited partnership interest in a newly formed entity to be based in Texas, Houston Biotech Partners, LP ("HBPLP"). Exhibit A at 26-39, 383-386.

5. HHR had the principal role in drafting the operative documents for creating the Texas-based HBPLP. Exhibit A at 26-39.

6. HHR represented the interests of Texas-based HBPLP in regards to the offering, as well as Hutton. Pursuant to the Sales Agency Agreement drafted by HHR, HBPLP was to be the issuer of the securities, so Hutton (as sales agent) and HHR (as Hutton's counsel) represented some of the interests of HBPLP (as delineated in the Sales Agency Agreement). Additionally, Hutton had a management interest in Texas-based HBPLP through a wholly owned subsidiary, created with HHR's assistance. HHR also represented that entity's interests. Exhibit A at 26-39, 88-90, 191-192.

7. HHR drafted the operative documents for receiving authorization for HBI, HBPLP and VRP (HBPLP's general partner) to do business in Texas. HHR filed those documents directly with the Texas Secretary of State. Exhibit A at 28; Exhibit B, excerpts of the deposition of Mary Hood (an HHR paralegal at all relevant times), at 104-109, 148, 79-80.

8. HHR lawyers visited Texas as part of the due diligence for the offering. Although the offering was national in scope, Texas, as the home of the business being

sold, was viewed as a critical state, and the due diligence in Texas was essential to the engagement. Exhibit A at 79, 83, 85, 91-92; Exhibit B at 39.

9. HHR advised Hutton to register fewer units in Texas than Hutton wanted and intended to sell here -- based upon HHR's understanding of how Texas registration fees were assessed. Exhibit A at 93-93; Exhibit B at 30-33, 42-46. The under-registration in Texas led directly to the oversale of units in Texas upon which this suit focuses.

10. HHR in its "Blue Sky Memorandum" to Hutton advised Hutton regarding the requirements of Texas law. The memorandum failed to warn of the severe consequences of an oversale in Texas, despite HHR's advice to under-register here. Exhibit C, excerpts of the deposition of Doreen Heywood (an HHR paralegal at all relevant times), at 112-113.

11. HHR prepared the Blue Sky application to register the HBPLP units in Texas. The implication in HHR's memorandum that this task was completed by Vinson & Elkins ("V&E") is simply untrue. HHR drafted all required forms, leaving only a blank for a V&E attorney to sign. HHR also communicated directly with HBI to complete that task. V&E fronted the initial application solely because that firm was better known to the Texas regulators. HHR did all of the substantive work. V&E was to forward any comments by the Texas regulators instantly to HHR for its preparation of responses. Moreover, V&E represented the issuer (HBI), not Hutton. Hutton was represented by HHR. Exhibit A at 50-51, 139, 301-311, 314, 382-383; Exhibit B at 63-64, 137-139, 141, 142, 145-146, 156-157, 163; Exhibit C at 125-126

12. HHR communicated directly with the Texas regulators regarding the offering in Texas. Exhibit A at 82, 314; Exhibit B at 170-171.

13. HHR lawyers travelled to Texas to supervise the printing of the prospectus for the offering. Exhibit A at 83.

14. HHR continued its representation in regards to the offering after Hutton merged into and became Shearson. The Shearson takeover of Hutton, however triggered a right in Texas-based HBI to take over Hutton's management interest in Texas-based HBPLP. HBI exercised that option. Exhibit A at 317-323, 336-338, 369.

15. HHR negotiated and drafted (supposedly on behalf of Shearson) the agreements between Shearson and HBI, whereby Texas-based HBI succeeded to Hutton's management role in Texas-based HBPLP. Exhibit A at 317-318, 369.

16. HHR, at the same time, was aware, but did not inform Shearson, that HHR's main contact person at Hutton (and subsequently Shearson) (and also the individual in charge of the HBI offering) was planning to leave Shearson to join HBI and HBPLP in Texas. Exhibit A at 52-54.

17. HHR drafted the consulting agreement between its contact person at Shearson and HBI/HBPLP, whereby the Shearson employee in charge of the offering shifted his allegiance from Shearson to HBI/HBPLP. HHR charged Shearson for that work without Shearson's consent. Exhibit A at 343-349, 360-362.

18. HHR never informed Shearson that its officer in charge of the offering was leaving Shearson to join HBI and HBPLP in Texas, that HHR had drafted that officer's consulting agreement with HBI and HBPLP (at Shearson's unwitting expense), and had allowed that same officer to sign the change of control documents between Shearson and HBI, on behalf of Shearson, despite HHR's knowledge that he was soon leaving Shearson for HBI/HBPLP. Exhibit A at 348-349, 360-362.

19. HHR informed Shearson in this same time period that, if it developed any conflict of interest because of HBI's takeover of Shearson's management interest in HBPLP, HHR would represent none of the parties involved. Of course, HHR's loyalties had already shifted to Texas along with HHR's favorite ex-Hutton contact. Exhibit A at 341-343.

20. HHR learned, along with Shearson, in late May, 1988, that there had been an oversale in Texas of over $5,000,000. This information was provided to HHR to enable it to complete the final sales report for filing in Texas and close the offering here. Such sales reports were an important part of HHR's duties. Exhibit B at 25, 93; Exhibit C at 36-37, 95-96, 130-134, 160.

21. HHR advised Shearson that pursuant to Texas law the oversale could be cured by paying a special fee, including a penalty, of approximately $15,000. Exhibit A at 145-146, 151, 158; Exhibit C at 165-168.

22. HHR did no research to substantiate its advice to Shearson regarding Texas law, relying instead upon one HHR's partner's off-the-cuff opinion that she thought Texas law permitted such a cure. Exhibit A at 60-61, 111-113. If HHR had done the barest amount of research (simply reading

the relevant provision of the Texas statute would have sufficed), HHR would have learned that a deadline loomed for paying that fee, which if missed would result in a rescission offer to all Texas purchasers. Exhibit A at 72, 77, 285-290.

23. HHR incorrectly surmised (again with no research) that the deadline for paying the late filing fee under Texas law was late-August. It was actually July. HHR forwarded that incorrect information to Shearson through its friend (and ex-Hutton/Shearson officer) now at HBI. Exhibit A at 133-136.

24. HHR, in direct contravention to Shearson's instructions, advised HBI in Texas that Shearson should pay the penalty portion of the fee. Shearson had instructed HHR to convince HBI to pay the full fee in accordance with the Sales Agency Agreement, which HHR had drafted. Exhibit A at 122-124, 129-131. HHR never consulted that agreement, but proceeded to ignore Shearson's instructions by suggesting to HBI that it pay only the non-penalty portion of the fee. Exhibit A at 59-60, 165-166, 203-204, 247-250; Exhibit C at 144-145.

25. HHR never informed Shearson that it had not followed Shearson's instructions or that a conflict had arisen between HBI/HBPLP in Texas and Shearson, or that HHR was siding with HBI/HBPLP in Texas. Exhibit A at 246-247; Exhibit C at 173.

26. HHR never informed Shearson that it had learned from HBI in Texas that, in accordance with HHR's advise, HBI refused to pay the filing fee. Exhibit A at 243-244, 249-251; Exhibit C at 151.

27. HHR never informed Shearson that there was a deadline under Texas law for paying the fee. Indeed, HHR informed Shearson after the deadline had passed that the cure was still available. Exhibit A at 158, 160-161, 169-170. As a direct result of the deadline's passing, the State of Texas ordered that rescission be offered to all Texas investors in HBLPL.

28. HHR's loyalties to HBI shifted wholeheartedly once it was discovered that the deadline for curing the oversale had passed and that rescission would therefore have to be offered to all Texas purchasers. At HBI's request, HHR prepared and sent a memorandum to HBI in Texas detailing HHR's version of alleged failings by Shearson. The memorandum included detailed descriptions of attorney/client communications between HHR and Hutton/Shearson. Of course, the memorandum neglected to mention HHR's failure to apprise Shearson of the deadline under Texas law, HHR's disobedience of Shearson's instructions, or HHR's conflict of interest. Exhibit A at 71, 208-213, 253-258.

29. HHR never requested or received Shearson's permission to disclose its attorney/client communications to HBI in Texas. Exhibit A at 71, 208-213, 253-258.

30. HHR visited Texas in September (its third such trip on the engagement) for an "all hands" meeting regarding the oversale. Exhibit A at 84, 172, 417.

31. HHR thereafter, and perhaps before, began representing HBI and HBPLP in Texas in regards to the oversale, including the obtaining and drafting an indemnity agreement whereby Shearson absorbed full financial responsibility for the Texas rescission. Of course, this continued representation was in violation of HHR's promise

to Shearson not to represent any party if any conflict arose. Exhibit A at 215-217, 229-242, 418-425.

32. HHR continues to represent Texas-based HBI (which has succeeded to all of HBPLP's interests) to date. Exhibit D, the affidavit of John Bingham (an officer of HBI).

33. Shearson has expended over $5.4 million in Texas to comply with the rescission ordered by the State of Texas.

HHR is Amenable to Jurisdiction
in Texas for its Texas Malpractice

HHR's contacts go far beyond the minimal requirements of the Due Process Clause. Due process requires only that (1) the defendant purposefully establish "minimum contacts" with Texas, (2) that the plaintiffs' claims "arise out of or relate to" those contacts, and (3) that the assumption of jurisdiction does not "offend traditional notions of fair play and substantial justice." See Guardian Royal Exchange Assur. Ltd. v. English China Clays, P.L.C., 815 S.W.2d 223. 230 (Tex. 1991). Jurisdiction also exists if HHR's contacts with the forum are "continuous and systematic." Id. This type of jurisdiction is termed general jurisdiction, while jurisdiction limited to related claims is termed special jurisdiction.

HHR has the burden to "negate all bases of personal jurisdiction." Id. at 231 n. 13 (citing Zac Smith & Co. v. Otis Elevator Co., 734 S.W.2d 662, 664 (Tex. 1987)); see also Smith v. Reynolds, 533 S.W.2d 861, 862 (Tex. Civ. App. -- San Antonio 1976, no writ)("It is settled that a defendant filing a special appearance under Rule 120a has the burden of pleading and proving that he is not amenable to process issued by the Courts of Texas.").

1. Special Jurisdiction

Although HHR correctly quotes the applicable rule for gauging whether this Court can exercise special jurisdiction over HHR, HHR's analysis of that test goes far afield. The first prong of the test is that the defendant "purposefully established 'minimum contracts' with Texas," not that the defendant (or even the plaintiff) resides or is based in Texas. See Guardian Royal, 815 S.W.2d at 230. Minimum contacts also "need not arise from actual physical activity in the forum state; activities in other forums with foreseeable effects in the forum state will suffice." Great w. United Corp. v. Kidwell, 577 F.2d 1266-67 (5th Cir. 1978)(citations omitted), rev'd on other grounds sub. nom., LeRoy v. Great W. United Corp., 443 U.S. 173 (1979); See also Burger King Corp. v. Rudzeuwicz, 471 U.S. 462, 472-78 (1985); Mississippi Interstate Express, Inc. v. Transportation, Inc., 681 F.2d 1003, 1007-11 (5th Cir. 1982). In this case, HHR's advice concerning Texas law (from wherever it originated) and HHR's conflict of interest with HBI/HBPLP (in Texas) had direct and foreseeable consequences in Texas: a $5.4 million rescission offer to all Texas purchasers of HBPLP units.

Moreover, HHR engaged in many activities in Texas, including direct communications with State agencies and private entities within Texas, all of which predicate Shearson's claims. In short, HHR practiced law in this State, and therefore should expect to defend its actions here.

The second prong requires only that the plaintiff's claims "arise out of or relate to the nonresident defendant's contacts with Texas." Guardian Royal, 815 S.W.2d at 230. All of Shearson's claims against HHR arise out of and relate to HHR's representation of Hutton, Shearson, and then HBI\HBPLP in regards to the HBPLP offering in Texas.

HHR incorrectly attempts to narrow the relevant contacts by focusing on HHR's version of Shearson's claims and on HHR's version of what contacts support liability. For example, in footnote 6 to its memorandum, HHR argues that its negotiation of the Sales Agency Agreement between HBI and Hutton is irrelevant to the jurisdictional analysis because, in HHR's view, such action, although occurring in and directed at Texas, does not predicate liability. HHR is wrong in its view of Shearson's claim of liability (the Sales Agency Agreement obligated HBI to pay the curative filing fee, contrary to HHR's advice), but more importantly, HHR is wrong to assert that the issue of liability governs the jurisdictional determination.

HHR's "[u]ltimate liability is not a jurisdictional fact, and the merits of the cause of action not at issue." Portland Savings & Loan Ass'n v. Bernstein, 693 S.W.2d 478, 480 (Tex.App. -- Corpus Christi 1984, writ ref'd n.r.e.), cert. denied, 475 U.S. 1016 (1986); see also Zac Smith & Co. v. Otis Elev. Co., 734 S.W.2d 662 666 (Tex. 1987). The existence of the contact to Texas, alone, "is a sufficient basis for the exercise of jurisdiction to determine whether or not the act or omission gives rise to liability in tort." Portland Savings, 693 S.W.2d at 480 (citation omitted; emphasis in original). Jurisdiction is supportable if HHR's alleged liability arises out of HHR's Texas contacts. Shearson's claims clearly arise out of HHR's Texas law advice and its representation of the conflicting interests of HBI and HBLPL, Texas residents.

HHR also attempts to confuse the issue by focusing on other of its actions, unrelated to the Texas offering, somehow suggesting that because HHR also represented Shearson outside of Texas, it is unfair to require that HHR defend itself here. Those other and additional actions, are, however, irrelevant to this inquiry under the same analysis

that determines what contacts are relevant. If HHR is liable to Shearson for causing rescission to all Texas investors, that liability is necessarily predicated on HHR's advice and actions related to Texas. HHR's actions in regards to any other state could not have caused Shearson's damage here. Thus, HHR's liability necessarily arises out of its Texas related contacts, and HHR is therefore amenable to this Court's jurisdiction.

The final jurisdictional requirement is that the "assumption of jurisdiction must not offend traditional notions of fair play and substantial justice." Guardian Royal, 815 S.W.2d at 230. "In this inquiry it is incumbent upon the defendant to present 'a compelling case that the presence of some consideration would render jurisdiction unreasonable.'" Id. at 231 (quoting Burger King, 471 U.S. at 477; other citations omitted; emphasis added). HHR has totally failed to make any showing that defending this action in Texas will be unfair or prejudicial.

Another relevant inquiry to this requirement is "the interests of the forum state in adjudicating the dispute." Id. Of course, Texas has a compelling interest in regulating those who practice law here and in determining the cause of a $5.4 million rescission offer ordered by the State of Texas.

Thus, this case is distinguishable from the cases cited by HHR, all of which deal with lawyers acting solely within the confines of the state in which they practice. Here, HHR's malpractice involves advice as to Texas law. HHR represented the conflicting interests of two Texas-based entities (HBI and HBPLP) resulting in a breach of its fiduciary duty and express promises to Shearson. The breach of HHR's promise to Shearson even continues to date because HHR continues to represent HBI and continues to assert against Shearson an attorney/client privilege as to

HHR's communications with Texas-based HBI. And finally, Shearson's claims against HHR and its damages necessarily arise out of and relate solely to HHR's Texas contacts.

Even if HHR's malpractice and breach of fiduciary duty were not focused in Texas, the effect of HHR's malpractice was felt here, and that is sufficient to support jurisdiction. See, e.g., Kidwell, 577 F.2d at 1266-67.

Finally, contrary to HHR's assertions, the exercise of jurisdiction over a non-resident law firm by a non-resident is not unprecedented, although not as common as the situation described in HHR's irrelevant authority. See RAF Financial Corp. v. Resurgens Communications Group, Inc., 127 B.R. 458 (D. Col. 1991) (jurisdiction supported by far less contact then occurred here). In that case, RAF, a Colorado resident, filed suit in Colorado against Resurgens, a Florida Company later residing in Georgia. RAF alleged that Resurgens "did not effectuate the registration of certain warrants and underlying shares with the Securities and Exchange Commission" as required by a previous settlement between the parties, resulting in a loss to the Colorado plaintiff of over one million dollars. Id. at 460. Resurgens in turn sued its Miami lawyers, K&L, who had failed to register the securities properly. K&L had no Colorado partners, no assets in Colorado, and all of its services were provided in Miami.

K&L argued that it was not subject to the jurisdiction of Colorado Courts "because K&L performed all legal services from its Miami office and could not anticipated [sic] being 'hailed' into court in Colorado. Furthermore, K&L argue[d] that any damage that Resurgens may incur will accrue in Georgia where it is presently domiciled." Id. at 463.

The Court found K&L subject to jurisdiction because it had undertaken, on behalf of Resurgens, to protect the interests of Colorado residents, and it was K&L's malpractice that resulted in the damage to Colorado residents for which they were attempting to hold K&L's client, Resurgens, liable. Id. at 465.

With far more direct contact with Texas than that, HHR caused Shearson to become responsible to HBI and HBPLP, Texas residents, for the rescission offer to HBPLP's Texas residents.

2. General Jurisdiction

HHR totally ignores and thus does not negate the requirements of general jurisdiction. As demonstrated below, HHR has practiced law in this State from since at least 1988 through the present. HHR even advertises its continued representation of HBI in its firm brochure.

For these reasons, the defendant, Hughes, Hubbard & Reed, is amenable to this Court's jurisdiction and should be required to defend its actions in this Court of laws.

Respectfully submitted,

Wynne & Maney

/s/

Kenneth R. Wynne
Texas Bar No. 22110000
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Counsel for Plaintiffs, Shearson Lehman Brothers, Inc. f/k/a Shearson Lehman Hutton, Inc. and Shearson Lehman Brothers Holdings, Inc. f/k/a Shearson Lehman Hutton Holdings, Inc.

CERTIFICATE OF SERVICE

A true and correct copy of the above has been served by hand delivery on August 9, 1992 to the following attorney of record:

Mr. Parker C. Folse, III
Susman Godfrey
5100 First Interstate Bank Plaza
1000 Louisiana
Houston, TX 77002-5096

/s/ Mark Maney
Mark Maney

(2)

Supreme Court, U.S.
FILED
MAY 13 1996
CLERK

No. 95-1651

In The

Supreme Court of the United States

October Term, 1995

SHEARSON LEHMAN BROTHERS, INC.
F/K/A SHEARSON LEHMAN HUTTON, INC.
AND SHEARSON LEHMAN BROTHERS HOLDINGS, INC.
F/K/A SHEARSON LEHMAN HUTTON HOLDINGS, INC.,

Petitioners,

v.

HUGHES HUBBARD & REED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT STATE OF TEXAS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PARKER C. FOLSE, III
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Attorneys for Respondent Hughes Hubbard & Reed

31 pp

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NO. 95-1651

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

SHEARSON LEHMAN BROTHERS, INC.
f/k/a SHEARSON LEHMAN HUTTON, INC.
and SHEARSON LEHMAN BROTHERS HOLDINGS, INC.
f/k/a SHEARSON LEHMAN HUTTON HOLDINGS, INC.

Petitioners,

v.

HUGHES HUBBARD & REED,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Hughes Hubbard & Reed ("HH&R") respectfully submits this brief in opposition to Shearson's petition for writ of certiorari, which should be denied.

PRELIMINARY STATEMENT

Shearson seeks review of a decision by an intermediate Texas appellate court which, in Shearson's own words, applied legal standards that are "well established" and "correctly stated the relevant legal rule." Shearson's Petition for Writ of Certiorari (hereafter, "Petition") at 14.[1/] Shearson's complaint is that the Texas Court of Appeals "erred in analyzing the facts and Shearson's claims." Id. Even if Shearson's distorted recitation of the record were accurate, and it is not, this would not be a case that justifies the Court's review. Shearson's criticism of the opinion below is, classically, "fact-specific." It amounts to nothing more than a disagreement with the lower courts' analyses of the evidentiary record and the significance they attached, or declined to attach, to specific evidence. *See* Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of eroneous factual findings or the misapplication of a properly stated rule of law.").

The Court's usual procedure has been to decline review when only factual questions are involved. *See Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J., respecting denial of certiorari) ("We do not grant a certiorari to review evidence and discuss specific facts") (quoting *United States v. Johnston*, 261 U.S. 220, 227 (1925)); *NLRB v. Hendricks County Rural Elec. Corp.*, 454 U.S. 170, 176 n.8 (1981) (because cross-petition presented primarily a question of fact, writ dismissed as improvidently granted); *Rudolph v. United States*, 370 U.S. 269, 270 (1962) (per curiam) (certiorari dismissed where case involved review of facts important only to the litigants). *See also* R. Stern, *et al.*, SUPREME COURT PRACTICE 189 (7th ed. 1995). This case presents no new or novel issue of law, or any legal holding that is even claimed to be inconsistent with the precedents of this Court or any other court. The Texas Court of Appeals' decision is limited in precedential significance to its specific factual context. It did not warrant review by the Texas Supreme Court, and it does not warrant review by this Court.

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[1] See also Petition at 10 ("The problem with this precedent is not that it misstates the relevant legal principles.").

Apart from being fact specific, the intermediate appellate decision below does not conflict with other precedent and Shearson does not argue in any respect that it does. *See* Rule 10(b). More than a dozen judges on three Texas courts have already reviewed both Shearson's arguments and the extensive record in this case, and not one has been persuaded. The trial court granted HH&R's motion to dismiss for lack of personal jurisdiction and filed detailed findings of fact and conclusions of law, which Shearson tellingly chose not to include in its Appendix to the Petition.[2]

In a detailed and carefully reasoned opinion, a three-judge court of appeals unanimously affirmed that decision in all respects. Significantly, the Texas Court of Appeals held "that the evidence was sufficient to support the findings of the trial court and the trial court did not impermissibly reach the merits of the case or err by failing to make additional findings." See Petition at 20a. Shearson sought rehearing, and that too was denied.

Shearson then sought discretionary review by the Texas Supreme Court, and that Court denied review without opinion, and without dissent. Shearson sought rehearing, and it was denied without dissent.

Shearson's Petition is a rehash of the arguments it presented at three levels of the Texas court system. It has not brought forward any new matter, and there is no reason to suspect that all of the judges in Texas who have already seen the case somehow

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[2] Although Rule 14.1(h)(i) requires the petitioner to include in its appendix all "opinions, orders, findings of fact, and conclusions of law . . . entered in conjunction with the judgment sought to be reviewed," Shearson omitted the trial court's findings and conclusions from its Appendix. They are reprinted in the appendix to this brief in opposition.

Shearson faults the trial court for entering the findings and conclusions proposed by HH&R's counsel and declining to adopt Shearson's. Under Texas law, it is presumed that the trial court duly considered the proposed findings and conclusions as to their correctness and compatibility with the court's views of the facts and the law, and adopted them as its own. *See Berkman v. D.M. Oberman Mfg. Co.*, 230 S.W. 838, 840-841 (Tex. Civ. App.--Austin 1921, writ dism'd). *See also Holliday v. Henry I. Siegel Co.*, 643 S.W.2d 519, 520 (Tex. App.--Houston [14th Dist.] 1982), *aff'd*, 663 S.W.2d 824 (Tex. 1984).

overlooked, misunderstood or failed properly to weigh the record or the positions that Shearson is now repeating (for the fourth time) to this Court.

The reason that Shearson's arguments have been unsuccessful is that they both misapprehend relevant precedents and grossly distort the record evidence. What Shearson says about the facts in its Petition and what the evidence shows are frequently two entirely different things. In the Texas courts, HH&R was required to devote considerable space in its briefs merely to correct Shearson's misstatements about the evidence. It must do that here as well. *See* Rule 15.2.

Shearson's misstatements of the record also infect its statement of the "Questions Presented." The case does not in fact present the questions framed by Shearson -- although it would not merit review even if it did. For example, contrary to the premise of Question 1, HH&R's conduct that is the basis for Shearson's claims did not occur in the context of its representation of Shearson "before the Texas Securities Board." Contrary to the assertion in Question 2, the record does not support the view that Shearson was subjected to regulatory enforcement action because of HH&R's advice. Question 3 assumes that the trial court addressed the merits of Shearson's claims in some way beyond what was necessary to resolve the issue of personal jurisdiction, but that is belied by the record. And Question 4 posits that Shearson's claims arose from HH&R's alleged conflict of interest in representing a Texas company, but, as the Texas Court of Appeals correctly concluded, that too is a mischaracterization of the record.

Finally, the main reason given by Shearson to explain why this Court should grant the writ is that the Texas Court of Appeals' opinion restricts the ability of the Texas courts to regulate and control the conduct of non-resident lawyers who give advice about Texas law. Putting to one side whether this "policy" argument is at all relevant to the due process issues implicated by a challenge to personal jurisdiction, the argument is extraordinarily ironic. Shearson made the same pitch to the Texas Court of Appeals and to the Texas Supreme Court, utterly without success. Despite Shearson's claim that "Texas' interests are preeminent," Petition at 13, the Texas courts saw no reason to open their doors to this

malpractice suit by a New York client against lawyers in the Los Angeles office of a New York law firm based on alleged incomplete advice about the law of Texas. If the courts of Texas were not troubled by that result, neither should this Court be.

In short, this case does not present any issue of importance to the jurisprudence of this Court, and the Court's review is not necessary to resolve conflicts in the jurisprudence of any lower courts. The dispute is not about the state of the law but about this specific evidentiary record and the application of settled legal principles. And, as we discuss further below, there was no error in the result reached.

REPLY TO SHEARSON'S STATEMENT OF THE CASE

The distortions of the record in Shearson's "Statement of the Case" are far-reaching. As discussed more fully below, the material facts are: (1) that neither Shearson nor HH&R is a Texas resident; (2) that Shearson's New York and California offices retained attorneys in HH&R's Los Angeles office to perform legal work relating to the registration with the Securities and Exchange Commission and 50 states' regulators of a securities offering for which Shearson acted as sales agent; (3) that Shearson sold more securities in Texas than it had registered for sale, ignored HH&R's advice to amend its registration, failed to consult Texas securities counsel (not HH&R) who had handled prior regulatory problems in connection with the same offering, and ended up trying to shift the blame to HH&R on the ground that HH&R in Los Angeles had not informed Shearson in New York about a deadline for amending; and (4) that Shearson in New York refunded to many Texas investors what they had paid for the securities that Shearson sold, allegedly as a consequence of HH&R's omission.[3]

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[3] Under Texas law, the appellate courts were required to give deference to the trial court's detailed findings of fact, which fully support the result in this case. See *Hotel Partners v. KPMG Peat Marwick*, 847 S.W.2d 630, 632 (Tex. App. -- Dallas 1993, writ denied):

> As the trier of fact, the trial judge may draw reasonable inferences from the evidence. We may not disregard his findings of fact on appeal if the record contains some

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Shearson's malpractice claims do not arise from HH&R's employment by any Texas resident or from any legal work that HH&R performed in Texas. Those claims are predicated entirely on an alleged omission by a California attorney to provide a client in New York with complete advice about Texas law. Everything else is a smokescreen for forum-shopping.

1. The Registration Process

In December 1986, E.F. Hutton & Co., Inc. ("Hutton"), Shearson's predecessor in interest, retained the Los Angeles office of HH&R as counsel in connection with the proposed formation of a research and development limited partnership, Houston Biotech Partners, L.P. ("HBP"), to finance work to be performed by Houston Biotechnology Inc. ("HBI"), which was Hutton's investment-banking client.[4] As is customary in these sorts of deals, HH&R represented both Hutton and (after it was formed) HBP in connection with the negotiation and documentation of a series of agreements to which HBP would be a party and in connection with the registration with the Securities and Exchange Commission, and collaterally with various state securities regulators,[5] of units of limited partnership interest in HBP and related securities to be sold by Hutton to the investing public. (Kanofsky Aff. ¶¶ 3-4, at FST 21.) Contrary to Shearson's assertion that HH&R "was Hutton's sole blue sky counsel in Texas," Petition at 16, Hutton also retained a large Texas firm,

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> evidence of probative value from which these inferences may be drawn, or unless the findings are so contrary to the overwhelming weight of the evidence as to be manifestly wrong.

[4] The facts set forth herein are attested to in the affidavit of Gordon R. Kanofsky ("Kanofsky Aff.") submitted below in support of HH&R's special appearance. The Kanofsky Aff. is contained in the First Supplemental Transcript ("FST"), at 20-24. Except as noted herein, Shearson did not dispute any of the facts attested to in the Kanofsky Aff.

[5] Many states simply rely on the federal registration process and do little, if any, independent review of a proposed offering. In any event, most "national" securities work is federally oriented. Where specialized state-law problems arise or are anticipated, underwriters including Shearson regularly retain local experts. Kanofsky Aff. ¶4, at FST, pp. 20-21.

Vinson & Elkins, to apply for registration of the HBP offering in Texas, using insofar as possible uniform registration materials that HH&R prepared in California.[6] (Kanofsky Aff. ¶ 4, at FST 21.)

The registration of the HBP securities became effective in July 1987 (Kanofsky Aff. ¶ 4, at FST 21) and, with respect to state registration, HH&R prepared and distributed to Hutton, among other things, a "blue sky" memorandum that summarized where and in what volume the registered securities could be sold on a state-by-state basis.[7] HH&R advised Hutton in the blue sky memorandum that "as members of The State Bar of California we do not purport to be experts in the law of any other jurisdiction." (FST 1508.)

2. Hutton/Shearson's Oversales

In late May 1988--eight months after HH&R completed the work described above and six weeks after Shearson/Hutton terminated the HBP offering--a Shearson employee in New York (Bob Lopes) provided HH&R in Los Angeles with what purported to be a state-by-state recapitulation of sales so that HH&R could undertake the ministerial task of filing post-offering sales reports with state regulators. (Kanofsky Aff. ¶¶ 5-6, at FST 21-22.) Up to that point, as was commonly the case, Hutton/Shearson had

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[6] Hutton also regularly used Texas counsel in its dealings with Texas securities regulators with regard to regulatory violations. For example, Hutton retained a law firm in Austin that was then called Johnson & Swanson to represent it before the Texas State Securities Board in addressing and resolving the Texas regulatory problems that resulted from Hutton's illegal offering of the HBP securities prior to the registration becoming effective. Johnson & Swanson was on a list of approved local counsel that Hutton regularly used on blue sky matters. Hutton also retained another New York law firm (not HH&R) to represent it before the Securities and Exchange Commission with respect to potential federal consequences of its premature Texas offers. (Kanofsky Aff. ¶ 4, at FST 21.)

[7] A copy of the blue sky memorandum appears at FST 1507-33.

provided no state-by-state sales information to HH&R.[8] (Kanofsky Aff. ¶ 6, at FST 22.) In reviewing the sales figures in early June 1988, an HH&R paralegal noticed that Shearson/Hutton apparently had sold securities in Tennessee, Massachusetts and Arizona, where the securities had not been registered at all, and apparently had sold more securities in Texas and Indiana than had been registered for sale. (Kanofsky Aff. ¶ 7, at FST 22.) These problems existed solely as a consequence of where Shearson/Hutton had sold the securities and had nothing to do with the registration documents that HH&R had prepared in 1987. (Kanofsky Aff. ¶ 7, at FST 22-23.) That Texas happened to be one of the states in which Shearson/Hutton apparently had failed to comply with the law was purely fortuitous as far as HH&R was concerned and was unrelated either to the fact that one of the issuers of the securities (HBI) also happened to be Texas-based[9] or to anything that HH&R did, let alone anything that HH&R did in Texas.[10]

Although these state enforcement problems were outside the scope of HH&R's engagement,[11] by means of a telephone call from Los Angeles to New York HH&R promptly alerted Mr. Lopes to the

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8 Hutton originally registered $1 million of the HBP securities for sale in Texas. The very last sentence of the text of the blue sky memorandum cautioned Hutton not to sell more securities than it had registered. (FST 1509.)

9 HBP was located in New York City until April 1988. (Kanofsky Aff. ¶ 7, FST 23.) Shearson disputed the trial court's finding in this regard but has never cited any evidence to the contrary. In the trial court Shearson submitted an affidavit to the effect that HBP is now located in Texas. In any case, since Shearson and not HBP was the plaintiff here, it is irrelevant where HBP is located.

10 HH&R was no more subject to personal jurisdiction in Texas than it would have been in Indiana, Arizona, Massachusetts or Tennessee.

11 Shearson disputed the scope of HH&R's engagement but offered no evidence in support. As discussed below, the scope of HH&R's engagement did not affect the jurisdictional issue because no HH&R act or omission that Shearson challenged took place in Texas.

problems in early June 1988 and suggested that Shearson might be able to cure the Texas oversale problem by paying the ordinary registration fee for the excess units that it had sold plus a penalty.[12/] (Kanofsky Aff. ¶¶ 7-8, FST 23.) Mr. Lopes said he would look into the various problems and get back to HH&R. (Kanofsky Aff. ¶ 8, at FST 23.) In June and July, HH&R made follow-up calls from Los Angeles to Shearson in New York City (getting through only once) and sent a follow-up letter from Los Angeles to Shearson in New York in mid-July. (Kanofsky Aff ¶ 8, at FST 23.) Shearson, however, apparently took no action to attempt to cure the oversale until the statutory procedure for cure, arguably as a matter of right (*i.e.*, without obtaining regulatory permission), expired on July 23, 1988, a month and a half after HH&R's first notice.[13/] On July 28, 1988, in a telephone conversation between a Shearson employee in New York City and HH&R in Los Angeles, Shearson for the first time directed HH&R to investigate and take charge of the problems. (Kanofsky Aff. ¶ 9, at FST 23.) By then, any automatic right under the statute to pay additional registration fees and penalties and thereby to seek a cure of the oversale had already expired. (Kanofsky Aff. ¶ 19, at FST 23.)[14/]

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12 By way of amendment to its original state court petition, Shearson cobbled together a claim that HBP could have been made to pay the penalty portion of the fee, even though the fault was entirely that of Hutton/Shearson, if only HH&R had presented a demand by its one joint client (Shearson) against its other joint client (HBP) with enough force and that HH&R's position as to the appropriate splitting of the fee was in breach of its fiduciary duty. As with all of Shearson's claims, whatever HH&R did or did not do in this regard occurred within California or in communications passing between New York and California and did not support jurisdiction in Texas.

13 Although Shearson's in-house counsel working on the matter (Jonathan Baum) apparently was aware of the deadline from prior dealings in Texas, HH&R was not. (Kanofsky Aff. ¶¶ 8-9, at FST 23.)

14 Shearson contended that when HH&R informed Shearson about the oversale problem seven weeks before the statutory cure date expired, it should have told Shearson when the allegedly automatic cure date expired. Shearson also suggested that HH&R erred in 1987 at the outset of the offering by not telling Shearson of the consequences of a prospective

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Subsequently, the Texas Securities Commissioner apparently took the position that because it was not possible to identify which of the securities sold in Texas were registered and which were not, all of the sold securities should be treated as unregistered and Shearson should offer rescission to all Texas purchasers. The offering itself and all related offering materials had been approved by the Texas regulators in advance of the offering; Shearson's sale of more securities than had been registered thus was a far cry from the usual sale of unregistered securities, *i.e.,* securities that have never been registered or subjected to regulatory review at all. Nevertheless, for its own reasons, and without seeking or purporting to rely on legal advice from HH&R, Shearson complied with the regulators' request and elected to give investors three years in which to opt to rescind. Shearson thus eventually refunded more than $5 million to Texas investors who chose to rescind their purchases, receiving the investors' HBP units in return.

3. Shearson's Misstatement of the Record

Shearson has repeatedly made assertions in its Petition that the record does not support. By way of example, we address some of the more egregious immediately below.

a) The Scope Of HH&R's Engagement

Shearson claims that in addition to handling initial registration of the securities in the various states and subsequently filing final sales reports for the purpose of apprising regulators of how many units had been sold, HH&R was to handle "all aspects of the Houston Biotech offering," Petition at 4, including the correction of any regulatory problems that might arise. In the Texas courts,

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oversale, if one occurred. Shearson now disingenuously claims that "something went horribly wrong in Texas," Petition at 3, but neglects to mention that the problem was of its own making after the completion of the registration process for which it engaged HH&R: Shearson does not deny that it was fully informed by HH&R about the number of units that were registered for sale in Texas or that it sold substantially more than the amount registered.

Shearson relied in support of this proposition on FST 1688-89, 424, and 1715.

The first citation is to the testimony of an HH&R paralegal who said that after she received information from Shearson about the number of securities actually sold in each state, and in connection with her preparation of final sales reports, she compared those figures with the amount registered for sale in each state so that she could let an attorney know if there were any problems. In this instance, she noted the oversale in Texas and reported that fact to an HH&R attorney. See FST 1689. Nothing in her testimony remotely supports the existence of the sweeping obligation alleged by Shearson.

FST 424 is testimony from Mr. Kanofsky that HH&R worked on the HBP offering, negotiated related contracts, and did some work subsequent to the offering. Again, nothing in his cited testimony remotely supports Shearson's global assertion that HH&R was to take all necessary corrective action if there were any problems. Indeed, when regulatory-enforcement problems arose at the outset of the offering, Shearson looked to Texas and other New York securities counsel (not HH&R) for advice. (FST 21.)

The final citation, FST 1715, is additional testimony from the HH&R paralegal that part of her job was to make sure that where particular states required the filing of sales reports after the close of an offering, the reports were timely filed. Contrary to Shearson's assertions, after completing the registration forms, HH&R had no role or duty at all during the offering period itself.

This is the record evidence on which Shearson bases its assertions about the scope of HH&R's engagement. Because the evidentiary record is not before the Court at this juncture and Shearson's brief is bereft of record citations, it should be incumbent on petitioning counsel to be scrupulously accurate about what the record shows.[15]

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[15] Shearson later implies (Petition at 12) that HH&R was engaged to provide advice regarding Texas laws and regulations. The record shows without contradiction that not only did HH&R expressly disclaim such expertise, but when Shearson/Hutton wished to obtain advice about Texas laws and regulations, it turned to its Texas counsel. (FST 21.)

b) HH&R's Role In Shearson's Decision About How Many Securities To Register For Sale In Texas

Shearson implies that HH&R decided how many units to register in Texas and that it did so "despite its knowledge that Texas sales would far exceed that amount." Petition at 4. What the record in fact shows is this:

Near the outset of the registration process, a Shearson employee in New York named Beth Weaver phoned an HH&R paralegal in Los Angeles named Mary Hood to tell her the number of securities to register for sale in Texas and elsewhere (FST 1240, 1248-49); Ms. Hood told Ms. Weaver (quite accurately) that Texas had no maximum registration fee (FST 1251) and would not refund registration fees even if regulators rejected the application for registration (FST 1251);[16] and Ms. Hood further suggested that Shearson "register as much as possible, depending on how much you want to pay as a filing fee" (FST 1251), bearing in mind that if the Texas regulators approved the registration, Shearson could amend its filing and increase the amount registered (FST 1252). Ms. Weaver then told Ms. Hood to register $1 million of securities in Texas. (FST 1252.) Ms. Hood in turn told Ms. Weaver in writing to advise HH&R as soon as possible if it wished to increase the registration in any state. (FST 1257.)[17]

Shearson, not HH&R, chose the amount to register in Texas. There is no evidence anywhere in the record that HH&R knew that

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16 At the time of this conversation, there was a risk that Texas regulators would not approve the HBP offering for sale in Texas -- at least in part because of a regulatory violation Hutton had recently committed in the state. (FST 1242, 1245.) If the regulators had in fact refused to approve the offering for sale, any registration fees paid at the time of application would have been forfeited.

17 In her testimony, Ms. Hood was explicit that she did not advise Ms. Weaver to await the completion of the offering to amend the Texas registration: "I didn't leave her with the impression that she should wait until she knew how much was sold and then register. I left her with the impression that if we get registered, we can then increase it should you need to increase the amount." (FST 1244.)

the actual sales in Texas would "far exceed that amount." In any event, Shearson knew, because HH&R had told it, that it would need to amend the registration if the offering was approved for sale in Texas and sales would exceed the amount initially registered. It is also undisputed that HH&R had nothing to do with selling the securities, had no way of knowing how many securities were actually sold, apart from whatever information Shearson reported to it, and was not informed of state-by-state sales until May 1988, after Shearson closed the offering after more than nine months of sales activity. (FST 22, 1751, 1759, 1772.) It is also undisputed that Shearson knew how many units were registered for sale in each state (FST 1751) and how many units it was actually selling. As the Texas Court of Appeals correctly concluded, Shearson was solely responsible for selling more than the amount it had registered in Texas.

Shearson never disputed that what Ms. Hood told Ms. Weaver was accurate. Its complaint was that Ms. Hood should have gone further and explained to Ms. Weaver the consequences that could befall Shearson if it failed to follow HH&R's advice to amend the registration before selling more than it initially registered. Apart from the unusual nature of the duty Shearson seeks to impose (i.e., a lawyer or paralegal must not only give a client advice when requested but also must advise of all consequences should the client unilaterally refuse to follow that advice, even when the client has given no indication that it will not follow the advice), the complaint was that a California-based paralegal of a New York law firm failed to volunteer legal advice in a phone call with a client in New York.

(c) Shearson's Failure To Amend The Registration

Shearson concedes that once HH&R learned of Shearson's oversale of HBP securities in Texas, HH&R timely advised Shearson to cure the problem by amending the registration and paying an additional filing fee. Petition at 5. Of course, Shearson failed to do this and tried to lay the blame for its own negligence at HH&R's door. Shearson claims that it "directed HH&R to instruct Houston Biotech to pay the additional registration fee" and that HH&R "totally ignored that instruction and advised Houston Biotech (at its office in Houston) to pay only the non-penalty portion of the required fee amount . . . ." Petition at 6. When it made these

identical assertions in the Texas courts, Shearson cited to FST 457 and 527-30.

Putting to one side the fact that, even if true, this allegation would provide no basis for personal jurisdiction over HH&R in Texas, it is a mischaracterization of the record. FST 457 is an excerpt from Mr. Kanofsky's deposition testimony about a telephone conversation he had from Los Angeles with Mr. Lopes, one of the Shearson employees in New York:

> I remember him suggesting to me that we call up the partnership and tell them to give us a check or to pay. Otherwise the filing fees in Texas, I remember telling him that I thought that the -- although I hadn't spoken to representatives of the partnership, that based on my knowledge of their overall viewpoints, that they would take the view that they would be willing to pay the normal registration fee but that it would be up to Shearson, Hutton to pay the excess portion, the penalty portion, of the filing fee. And I told him I would check with them on that.
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> I also -- we ended our call by him saying that he would look into the various matters that we discussed and get back to me.

(FST 457-58.) This is hardly evidence of a "direction" from Shearson to have HH&R "instruct" Houston Biotech to pay the registration fees.

FST 527-30 is additional testimony from Mr. Kanofsky about his subsequent telephone conversation with representatives of the HBP partnership. The most relevant portion is as follows:

> In the course of the conversation about the five problem states, I told him that I believe that the Texas problem may be able to be fixed by paying three times the normal filing fee and that I had -- that Mr. Lopes had suggested that that entire fee come from the partnership and that I had, in my prior conversation with Mr. Lopes told him that I would raise that with the partnership but that I expected that the answer

> of the partnership to be that they would not be willing to pay the penalty portion of the filing fee. And both Mr. Crary and Mr. Hutchins confirmed that that would be the view of the partnership.

(FST 528-29.) Again, this testimony hardly qualifies as evidence that HH&R "totally ignored" Shearson's "instructions" or that HH&R was "advising" the partnership to pay only the non-penalty portion of the fees. At most, it reflects only the entirely logical (and hardly sinister) objective view that because Shearson had caused the regulatory problem that gave rise to a penalty for overselling and failing to amend, one might expect that, as between HH&R's joint clients, Shearson should pay the penalty portion.[18/]

Mr. Kanofsky further testified that he asked another HH&R paralegal, Doreen Heywood, to call Lopes and relay the information that he had learned from the partnership, and that she told him she had done so. (FST 530, 644-45.) Mr. Kanofsky was also told by one of the HBP representatives that he, too, would call others at Shearson and "try to get Lopes moving." (FST 532, 540.) Mr. Kanofsky was later called by Ms. Weaver of Shearson, who explained that in fact "Shearson would pay the penalty portion of the fee and that Mr. Lopes would be the person to arrange to get it." (FST 555; see FST 554.)[19/] Of course, Shearson never paid the fee. By contrast to this evidence is Shearson's unsupported claim that HH&R "neglected to inform Shearson of Houston Biotech's refusal to pay the remedial portion of the fee." Petition at 6.

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[18] In fact, Mr. Kanofsky's testimony does not indicate that he was giving advice or taking a position about which of HH&R's clients should pay what. In his conversation with Mr. Lopes, he made only a prediction about what HBP's position would be. In his conversation with HBP, he acted as a conduit for Shearson's request.

[19] Well after the deadline for amendment of the registration had expired, HH&R learned that despite what it had been told by Ms. Weaver of Shearson, Mr. Lopes apparently did not view it as his job to deal with the Texas oversale. (See FST 604-05.)

ARGUMENT

As Shearson concedes, the generally-applicable constitutional test for the exercise of personal jurisdiction over a nonresident defendant is well-settled. The nonresident defendant must have purposefully established "minimum contacts" with the forum state. *Burger King v. Rudzewicz*, 471 U.S. 462, 474 (1985). There must be a "substantial connection" between the nonresident defendant and the forum arising from action or conduct of the nonresident defendant purposefully directed toward the forum state. *Id.* at 475. When specific jurisdiction is asserted, the cause of action must "arise out of or relate to" those activities that the defendant has "purposefully directed" at residents of the forum. *Id.* at 472. When general jurisdiction is alleged, pursuant to which a court exercises jurisdiction over a suit that does not arise out of or relate to the nonresident defendant's contacts with the forum, there must be continuous and systematic contacts between the defendant and the forum. *Id.* at 473 n.15; *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 n.9 (1984). Finally, the assertion of personal jurisdiction must comport with "fair play and substantial justice." *Burger King*, 471 U.S. at 476-77.

This Court has eschewed a "mechanical" application of this--or any--formulation of the constitutional test. *Burger King*, 471 U.S. at 478. Instead, the minimum contacts analysis has been refined by identifying recurring fact patterns and outlining guidelines for application of the due process test to these patterns.

Astoundingly, Shearson has not cited even one case involving the recurrent fact pattern of a malpractice claim against a nonresident attorney; instead it purports to rely on inapposite cases involving intentional torts and products liability. Shearson's failure to cite cases addressing an attorney's amenability to personal jurisdiction outside the state where he is licensed and where the challenged legal services were performed is because the guidelines for application of the due process test to these patterns that the cases on point establish demonstrate that there was no basis for jurisdiction over HH&R in Texas and thus no conflict in the decisions for this Court to consider under Rule 10(b) in deciding whether to hear this case. Shearson's suggestion that "national" law firms are amenable to personal jurisdiction in <u>every</u> state not only is

without support in the cases but is so far-fetched that no court has ever suggested that such a conclusion is even plausible.

The cases with which the decisions below are entirely consistent hold that there is no jurisdiction over a nonresident attorney where, as here, the challenged work was performed in the state in which he is licensed to practice rather than in the forum state. Requiring suit in the state where legal services were performed, especially where, as here, the countervailing policy of providing a local forum to a resident plaintiff does not apply, assures that the forum state will be the state that licensed the attorney and established the controlling standard of care against which the attorney's conduct must be measured. *See Myers v. Emery*, 697 S.W.2d 26, 32 (Tex. App. -- Dallas 1985, no writ) (Texas lacked jurisdiction over Oklahoma law firm hired to represent Texas defendant in Oklahoma lawsuit, despite firm's having made telephone calls and sent correspondence to its client in Texas in connection with litigation and despite firm's numerous other fortuitous contacts with Texas); *FDIC v. Malmo*, 939 F.2d 535, 537 (8th Cir. 1991) (Missouri lacked jurisdiction over California attorneys with respect to claim arising out of services performed in California even though attorneys solicited client in Missouri and even though "effects of defendant's conduct (*i.e.*, injury to the client) were intended to, and did occur in Missouri"); *Austin Co. v. Pennie & Edmonds*, 823 F.2d 223, 226-27 (8th Cir. 1987) (no jurisdiction in South Dakota over South Dakota client's malpractice action against New York law firm despite firm's trip to South Dakota to review documents and numerous communications by telephone, mail and courier between New York and South Dakota); *Mayes v. Leipziger*, 674 F.2d 178 (2d Cir. 1982) (no jurisdiction in New York over California lawyer hired by New York client to handle litigation in California); *Smith v. Morris & Manning*, 647 F. Supp. 101, 104 (S.D.N.Y. 1986) (Georgia law firm not amenable to jurisdiction in New York with respect to claim by New York client regarding estate-planning work done in Georgia despite numerous communications passing between Georgia and New York); *Campbell v. Gaspar*, 102 F.R.D. 159, 162 (D. Nev. 1984) (no jurisdiction in Nevada over claim by Nevada client that California attorney committed malpractice in California; "Where personal services are involved, such as those of a professional person like a

doctor or lawyer, the place where the services were rendered is very important. In this regard, the rule is that use of the mails or telephone does not amount to purposeful activity, invoking the benefits and protections of the state on the receiving end of such communications."); *Stonecipher v. Sexton*, 54 F.R.D. 435, 439-40 (D. Kan. 1972) (no jurisdiction in Kansas over malpractice claim by Kansas client against Arizona law firm for negligent handling of Illinois litigation). *See generally Credit Lyonnais Bank Nederland, N.V. v. Manatt, Phelps, Rothenberg & Tunney*, 202 Cal. App. 3d 1424, 1437, 249 Cal. Rptr. 559 (1988) (foreign lawyer's alleged malpractice with respect to California real-estate transactions and dealings with local counsel must be adjudicated in jurisdiction that licensed lawyer).

Stripped of its rhetoric, Shearson's position is that a nonresident attorney who gives incorrect legal advice (or, as in this case, allegedly fails to give complete advice) about the law of the forum state is amenable to a malpractice suit in that state, even when the client was not a resident of the forum either. Shearson's position is without support in law or in reason. We are unaware of a single reported instance where a court exercised jurisdiction over an attorney in a forum that was neither where the attorney was licensed to practice, where the work complained of took place, nor where the plaintiff/client resided. The Texas courts properly held that this should not be the first such case.

Faced with the fact-specific nature of the rulings below and the total absence of even a claimed conflict between those rulings and any other published decision, Shearson can point to no reason under Rule 10 why the Court should review this case. It argues that more and more nonresident companies like Shearson will turn to nonresident lawyers for advice about Texas law, and that Texas should have a strong interest in regulating the conduct of such lawyers. Petition at 11-12. At least insofar as the argument bears on personal jurisdiction, the three Texas courts below obviously disagreed.

Whether or not Shearson's premise is factually correct (and there is no reason to think it is), the conclusion hardly follows. While Texas certainly has an interest in regulating the practice of law in Texas, it has no interest in regulating the practice of law in

California or New York, particularly where the client claiming injury is not a Texas resident. Certainly, Shearson fails to offer any policy reason why Texas must make its busy courtrooms available to nonresident plaintiffs suing nonresident lawyers simply because the claim is based on incomplete advice given elsewhere about Texas law.

Shearson also says that unless the Texas Court of Appeals is reversed, "HHR, which caused the problem, will escape even an assessment of its responsibility" and will be "immune from Texas' jurisdiction for its breaches of the ethical rules governing the practice of law in Texas." Petition at 12. As to the first argument, the import of the Texas Court of Appeals' opinion is only that Shearson cannot sue HH&R in Texas, not that HH&R is immune from suit anywhere. As to the second argument, while Shearson seeks to create the implication that HH&R attorneys in California were guilty of violating Texas ethical rules of conduct, it provides no support for such an unlikely claim. Moreover, it is absurd to suggest that a nonresident lawyer must be licensed to practice law in Texas, and must be made subject to disciplinary action in Texas before he or she can advise a nonresident client about Texas law or prepare application forms to be transmitted to a Texas regulatory agency by the client's Texas counsel. That would mean that every issuer and underwriter would require at least 50 sets of counsel in a nationwide offering.

Finally, Shearson makes a thinly veiled appeal to protectionism, suggesting, on the one hand, that Texas courts should have intervened to preserve the integrity of Texas law since it was the subject of advice by non-Texas lawyers and, on the other hand, that courts in the state where the lawyers are licensed should not be trusted to determine whether such lawyers acted appropriately. That kind of provincial appeal is no part of the constitutional test for *in personam* jurisdiction. Fortunately, the Texas courts rejected this illogical and insulting parochialism, which would only have given Texas and its lawyers a bad name, leaving nothing for this Court to review.

As shown above, HH&R was not subject to personal jurisdiction in Texas because it did not have the requisite "minimum contacts" and Shearson's claims did not arise from or relate to such

contacts as did exist. But even if the facts were otherwise, HH&R still would not have been subject to personal jurisdiction in Texas because, as the trial court found, the exercise of jurisdiction over it would not have comported with "fair play and substantial justice." *Burger King*, 471 U.S. at 476-77.[20] Shearson has not addressed this point in its Petition, but it would provide an independent ground for denial of the Petition.

PRAYER

Shearson's Petition should be denied.

Respectfully submitted,

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[20] The Texas Court of Appeals did not reach this issue because it agreed that jurisdiction could not be sustained either under the doctrine of general jurisdiction or under the doctrine of specific jurisdiction. However, the trial court did reach the issue and resolved it in HH&R's favor.

APPENDIX

NO. 91-038067

SHEARSON LEHMAN BROTHERS INC. f/k/a SHEARSON LEHMAN HUTTON, INC. and SHEARSON LEHMAN BROTHERS HOLDINGS, INC. f/k/a SHEARSON LEHMAN HUTTON HOLDINGS, INC.	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	HARRIS COUNTY TEXAS
v.	§	
HUGHES HUBBARD & REED	§	
Defendant.	§	152ND JUDICIAL DISTRICT

[PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW GRANTING SPECIAL APPEARANCE

In accordance with the Court of Appeals' order entered on December 9, 1992, the Court makes the following findings of fact and conclusions of law in support of its order entered on September 16, 1992, granting defendant's special appearance and dismissing this action for want of personal jurisdiction over defendant.

FINDINGS OF FACT

1. Defendant Hughes Hubbard & Reed ("HH&R") is a New York partnership with its principal place of business in New York City and other offices in Los Angeles, California; Washington, D.C.; Miami, Florida; and Paris, France. HH&R is in the business of providing legal services.

2. HH&R has no office or employee in Texas, and no HH&R lawyer is a member of the Texas bar. HH&R does not have continuous or systematic contacts with Texas and does not engage in substantial activities in Texas.

3. Plaintiffs Shearson Lehman Brothers, Inc., formerly known as Shearson Lehman Hutton, Inc., and Shearson Lehman

Brothers Holdings, Inc., formerly known as Shearson Lehman Hutton Holdings, Inc. together with their predecessor in interest E.F.Hutton & Co. Inc. (collectively, "Hutton/Shearson") are an investment-banking firm with their principal place of business in New York City.

4. In December 1986, Hutton/Shearson retained the Los Angeles office of HH&R in connection with a proposed national offering of units of limited partnership interest in Houston Biotech Partners, L.P. ("HBP"), a research and development limited partnership to be formed to finance work to be performed by Houston Biotechnology Inc. ("HBI"). HBP's only office was in New York City until April 1988. HH&R acted as counsel in connection with the formation of HBP, the negotiation and documentation of agreements to which HBP would be a party and the registration with the Securities and Exchange Commission and 44 state's securities regulators of the securities to be sold by Hutton/Shearson to the investing public. The Hutton/Shearson employees involved in this work were based in either New York or California. Various law firms besides HH&R, including Vinson & Elkins in Texas, were responsible for clearing the proposed offering locally, using insofar as possible the uniform materials that HH&R prepared for federal and state registration purposes. HH&R informed Hutton/Shearson that it did not purport to be expert in the state law of any state other than California.

5. In general, when state "blue sky" enforcement problems had arisen in the past in Texas and elsewhere on other offerings, Hutton/Shearson retained local expert counsel to deal with them. In connection with the HBP offering, Hutton/Shearson retained its usual Texas regulatory expert counsel, Johnson & Gibbs in Austin, to handle problems created by its having violated the Texas "blue sky" laws by offering HBP securities to a large number of people before the Texas registration became effective on July 23, 1987. Hutton/Shearson also retained a New York law firm other than HH&R to represent it before the Securities and Exchange Commission with respect to the potential federal consequences of the unlawful Texas offers.

6. HH&R successfully completed its federal and state registration work in connection with the HBP offering by September

1987. Virtually all of the work was done by HH&R in Los Angeles, although HH&R lawyers from Los Angeles made two trips to Texas, once in early 1987 for due diligence purposes and once in July 1987 to supervise the printing of the offering materials. Hutton/Shearson does not allege that HH&R's due diligence was faulty or that there was any error in the printed offering materials. Hutton/Shearson's claims do not arise out of HH&R's limited contacts with Texas in connection with the HBP offering.

7. Hutton/Shearson terminated the HBP offering in April 1988. So that HH&R could perform the ministerial task of filing post-offering sales reports as required by various states' securities regulators, a Hutton/Shearson employee in New York supplied sales data to HH&R in Los Angeles in late May 1988. In the course of preparing the sales reports, an HH&R paralegal in Los angeles noticed that Hutton/Shearson appeared to have sold securities in Tennessee, Massachusetts and Arizona, where the HBP offering had not been registered for sale, and to have sold more securities in Texas and Indiana than it had registered for sale in those states. In early June 1988, an HH&R associate in Los Angeles telephoned the Hutton/Shearson employee in New York who had supplied the sales data and notified him of the problems that apparently had arisen in these five states. With respect to Texas, the associate indicated that he thought that it might be possible to cure the problem by retroactively amending the Texas registration papers and paying a fee including a penalty. The Hutton/Shearson employee in New York responded that he would look into the problem and get back to the associate. A follow-up telephone call was made from Los Angeles to New York on June 29, 1988, and a follow-up letter was sent from Los Angeles to New York on July 18, 1988.

8. On July 28, 1988, another Hutton/Shearson employee in New York telephoned the HH&R associate in Los Angeles to engage HH&R to represent Hutton/Shearson with respect to the five state regulatory matters first pointed out in early June 1988. The time to request permission for retroactive amendment of the securities registration in Texas pursuant to a provision in the Texas "blue-sky" law had expired five days earlier, and Hutton/Shearson had by then taken no action. HH&R was unaware of any deadline for taking action in Texas. Hutton/Shearson subsequently granted

all Texas purchasers three-year options to rescind their purchases and ultimately refunded in excess of $5 million in the process.

9. The only time that any HH&R representative was in Texas with respect to the Texas oversale problem was after the fact on September 14, 1988, when Hutton/Shearson summoned two HH&R lawyers from Los Angeles to Houston to explain what they knew about the problem. Hutton/Shearson's claims against HH&R do not arise out of this meeting or indeed out of any contact between HH&R and Texas.

10. Hutton/Shearson's claims arise out of work done by HH&R in Los Angeles and telephone and written communications passing between HH&R in Los Angeles and Hutton/Shearson in New York.

11. That one of Hutton/Shearson's regulatory problems involved Texas law fortuitously depended entirely on where Hutton/Shearson actually sold HBP securities, a process in which HH&R was not involved, and had nothing to do with HBI's presence in the state.

12. In connection with the oversale problem, HH&R did not purposefully establish contacts with Texas, direct its activities at Texas residents or avail itself of either the privilege of conducting activities in Texas or the benefit of Texas law. HH&R did not intentionally cause any effect in Texas.

13. HH&R could not reasonably anticipate being haled into a Texas court on account of any of its acts or omissions relating to the oversale problem.

14. It would not be reasonable for the Court to assert personal jurisdiction over HH&R in this action.

15. In substance, this is a case of a New York client complaining that the Los Angeles office of a New York law firm gave incomplete advice about an issue of Texas law. It can more appropriately be resolved in another forum.

16. To the extent that any of the foregoing findings of fact are in whole or in part deemed to be conclusions of law, the Court also so concludes as a matter of law.

CONCLUSIONS OF LAW

1. Texas extends personal jurisdiction to the full limits of the United States Constitution.

2. The personal jurisdiction test to be applied appears in Guardian Royal Exchange Assurance, Ltd. v. English China Clays, P.L.C., 815 S.W.2d 223, 230 (Tex. 1991) (footnotes omitted):

> First, the nonresident defendant must have purposefully established "minimum contacts" with Texas. There must be a "substantial connection" between the nonresident defendant and Texas arising from action or conduct of the nonresident defendant purposefully directed towards Texas. When specific jurisdiction is asserted, the cause of action must arise out of or relate to the nonresident defendant's contacts with Texas. When general jurisdiction is alleged, there must be continuous and systematic contacts between the nonresident defendant and Texas. General jurisdiction requires a showing of substantial activities by the nonresident defendant in Texas.

This test is not to be applied mechanically.

3. HH&R has negatived both kinds of personal jurisdiction here.

4. Under the facts found above, HH&R did not have "minimum contacts" with Texas and exercise of personal jurisdiction over HH&R in this action also would not comport with traditional notions of fair play and substantial justice.

5. An attorney who gives advice about the law of a state other than where he practices does not thereby automatically subject himself to the personal jurisdiction of the other state. Particularly this is true where the plaintiff is not himself a resident of the other state. HH&R is no more subject to personal jurisdiction in Texas for the matters at issue in this action that it would have been in Tennessee, Massachusetts, Arizona or Indiana, the other states in

which Hutton/Shearson encountered regulatory problems as a result of its unauthorized sales of HBP securities.

6. To the extent that any of these conclusions of law are in whole or in part deemed to be findings of fact, the Court also so finds.

SIGNED this 16th day of December, 1992.

/s/

The Honorable Jack O'Neill
District Judge

Supreme Court, U.S.
FILED
JUN. 6 1996
CLERK

(3)

No. 95-1651

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

SHEARSON LEHMAN BROTHERS, INC. f/k/a SHEARSON LEHMAN HUTTON, INC. and SHEARSON LEHMAN BROTHERS HOLDINGS, INC. f/k/a SHEARSON LEHMAN HUTTON HOLDINGS, INC.,
Petitioners,
v.
HUGHES, HUBBARD & REED,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Texas

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Petitioners, Shearson Lehman Brothers, Inc. f/k/a Shearson Lehman Hutton, Inc. and Shearson Lehman Brothers Holdings, Inc. f/k/a Shearson Lehman Hutton Holdings, Inc. (together "Shearson"), reply to the opposition to petition filed by the Respondent, Hughes, Hubbard & Reed ("HHR"):

Introduction

HHR's opposition is a study in misdirection. To avoid the issues, HHR goes to great lengths to couch the jurisdictional question as a mere factual dispute. HHR covers this diversionary tactic with merits arguments and insulting (and untrue) assertions that the Petitioners have distorted the record.

HHR's diversionary tactic, however, fails because HHR's purported factual dispute is transcended by a core element of the constitutional issue for this Court -- the role of the *merits* of Petitioners' claims in defining the due process boundaries of personal jurisdiction. HHR does not deny the basic jurisdictional facts as Shearson presents them. It rather disputes the ultimate merits of Shearson's claims arising from those facts. For example, HHR does not dispute that it advised Shearson about how to deal with the Texas oversale, but instead disputes that its advice caused the oversale and denies that HHR is liable for that incorrect advice. Likewise, HHR denies that it breached its fiduciary duty to Shearson by continuing to represent Houston Biotech when a conflict arose, but does not, and cannot, deny that (a) it did represent Houston Biotech and (2) there was at least a potential conflict and dispute between Shearson and Houston Biotech as to responsibility for the oversale.

By framing the case in terms of a dispute on the liability questions associated with the scope of HHR's engagement -- issues on the merits -- HHR simply avoids the *legal*, indeed *constitutional*, question of whether such merits

determinations have any place in a jurisdictional inquiry. While it is true that the trial court adopted much of HHR's version of the merits, the question presented here is whether the trial court should have addressed those merits at all in deciding its jurisdiction, and whether in doing so, the trial court improperly assessed the constitutional boundaries of its jurisdiction. The proper jurisdictional question is whether HHR had sufficient contacts with Texas to subject it to jurisdiction there for a determination of this dispute, not how the trial court would rule on the ultimate merits of the claims and defenses arising from those contacts.

Thus, there are two core issues for this Court's review and guidance:

(1) Should a trial court address the merits of a plaintiff's claims in determining whether it can constitutionally exercise jurisdiction over the defendant?

(2) Do the constitutional boundaries allow jurisdiction under the facts of this case?

HHR's opposition ignores the first issue entirely, and in doing so fails to address the jurisprudential importance of the second.

Significantly, the two issues are independent. This Court could address the relationship between the merits of an action and personal jurisdiction, while reserving discussion of whether there is jurisdiction under a proper analysis. In the alternative, this Court could accept all of HHR's purported fact disputes (whether merits-based or not) and address the important jurisdictional question that remains. In either event, this is an important case that should not be decided on the basis of ad hominem attacks by opposing counsel.

Jurisdiction does not depend upon a determination of the merits of Shearson's claims.

Try as it might, HHR cannot reduce Shearson's petition to a factual dispute. What HHR is really so stridently disputing is Shearson's version of the merits of its claims,[1] which should be decided by a jury, not an appellate or trial court relying on abbreviated proof. In fact, HHR's jurisdictional position, and the faulty decisions of the lower courts, rests on two *merits* rulings: (a) that HHR's task was limited to the initial registration, and (b) that HHR successfully completed that limited task (or at least that no failure by HHR to finish that work contributed to Shearson's damages).

The proper jurisdictional inquiry, however, is *not* what is the *answer* to these questions, but whether these *questions* are *sufficiently connected to Texas* that a Texas jury

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[1] HHR also tries to concoct a fact dispute using the insulting rhetorical device of asserting that Shearson's counsel has misstated the record, which is as false as it is insulting. For example, HHR asserts that Hutton hired Vinson & Elkins as local counsel in Texas. Opposition Brief at 6-7. Hutton actually hired HHR, and only HHR, to conduct the Blue Sky registration for Houston Biotech securities that Hutton was bringing to market. Vinson & Elkins was hired by, and represented, Houston Biotech. HHR's claim that Hutton hired Vinson & Elkins is unsupported, even by the affidavit cited by HHR in support of this distortion, which states only that Vinson & Elkins had some responsibility for the Texas registration, but not whom it represented.

HHR also argues that Shearson misrepresents the record by asserting that it did not successfully complete its work for Hutton, but refers to an abbreviated list of Shearson's record citations supporting that proposition.

Rather than succumb to HHR's diversion, the Court should see those fact questions as irrelevant to the jurisdictional analysis, assumable arguendo as HHR asserts. Moreover, whether HHR successfully completed its tasks in Texas is a merits question for the jury.

should answer them. The findings and opinions of the lower courts are replete with merits determinations, and it is those determinations, not a minimum contacts analysis, that governed their jurisdictional decisions.

To further obscure the issues on which review is sought HHR focuses on irrelevant facts. For example, HHR finds it merely fortuitous that the oversale occurred in Texas. Brief in Opposition at 8. That analysis is, however, entirely backward; it is irrelevant that HHR agreed to register Houston Biotech's securities in states other Texas. Shearson's claims relate solely to the Texas offering, and therefore, only HHR's contacts with the Texas offering are relevant to the jurisdictional analysis. HHR's preoccupation with the offering in other states is a "smokescreen." *See id.* at 6. HHR also emphasizes that its incorrect advice emanated from California, but where the legal work for the Texas registration originated was never important; HHR could have done the work at any of its offices, or Gordon Kanofsky, its lead lawyer, could have advised Hutton (later Shearson) from a vacation home. The only critical locus was, and is, Texas, where the securities were to be properly registered and where Shearson was subjected to the rescission order of the Texas State Securities Board. The location of Shearson's home office is likewise insignificant. Shearson, as did Hutton before it, operates from many offices around the world from which it could have functioned as underwriter.

The confusion engendered by the lower courts' and HHR's diversion into the merits demonstrates the importance of this Court's addressing the proper relation between the merits of a plaintiff's claims and jurisdiction over the defendant, a question never before addressed by this Court.

There is jurisdiction over Shearson's claims

The second major issue (comprising questions presented 1, 2, and 4) is whether there is jurisdiction over HHR in Texas arising from its advice to Shearson.

Ironically, this issue is best framed by putting HHR's insulting rhetoric aside and humoring all of its fact positions (merits-based and otherwise). HHR argues that an attorney is subject to suit only where he or she is licensed or where his or her advice originates. *See* Opposition at 8, 9, 17. In other words, since HHR did not act in Texas, it cannot be sued there.[2] In contrast, HHR, giving itself the benefit of all of its merits-derived limits on its representation of Shearson in Texas, sets out its version of Shearson's position as follows: "Stripped of its rhetoric, Shearson's position is that a nonresident attorney who gives incorrect legal advice (or, as in this case, allegedly fails to give complete advice) about the law of the forum state is amenable to a malpractice suit in that state, even when the client is not a resident of the forum either." That formulation would be correct with the addition that HHR knew Shearson was going to act, and did act, in the forum state on the advice provided. Given nothing more, HHR should be subject to the jurisdiction of the Texas courts.

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[2] HHR asserts in regards to the malpractice claim that "the scope of HH&R's engagement did not affect the jurisdictional issue because no HH&R act of omission that Shearson challenged took place in Texas." *Id.* at 8 n.11.

As to the breach of fiduciary duty claim, HHR likewise asserts that "whatever HH&R did or did not do in this regard occurred within California or in communications passing between New York and California and did not support jurisdiction in Texas." *Id.* at 9 n.12. This is untrue, of course; HHR breached its fiduciary duty to Shearson mainly through communications with its Texas client, Houston Biotech, although those communications did originate with HHR in California.

HHR's position is founded on a series of irrelevant cases, in which the defendant lawyer was hired to represent an out-of-state client on matters directed toward the lawyer's home state; the only contacts with the forum state (always the client's home) were the lawyer's communications with the client. HHR incorrectly extrudes from these factually limited cases a rule that lawyers can only be sued in the state in which they are licensed. The cases stand for no such thing. Certainly, Texas or any other state could prosecute out-of-state attorneys practicing without a license. *See* Tex. Gov. Code § 81.101 *et. seq.*

Admittedly, there are not a raft of reported cases of the kind involved here. That, however, confirms the importance of this matter. Traditionally, lawyers' practices were limited to the states in which they were licensed. As demonstrated by at least this matter, that situation is changing. In the last decade, national firms have emerged. Even more recently, communication abilities have advanced such that legal advice can be given from almost anywhere. In this case, HHR advised Shearson regarding the blue sky requirements of all 50 states, and in particular HHR sought to direct Shearson's activities in and towards Texas and the Texas State Securities Board. Although HHR may have called from California to New York to give its advice, Shearson could have relied on that advice only in and affecting Texas. The same line of cases relied upon by HHR, which generally discuss actions against providers of professional services "like a doctor or lawyer,"[3] recognize that such professionals should be subject to foreign jurisdictions when they purposefully direct their services there. For example, while a doctor is generally not subject to jurisdiction in another state solely because the doctor treats

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[3] HHR's Opposition at 17-18, *quoting Cambell v. Gasper*, 102 F.R.D. 159, 162 (D.Nev. 1984).

an out-of-state resident, a doctor who treats a patient by telephone or the mails is subject to jurisdiction wherever such advice is directed. *See Kennedy v. Freeman*, 919 F.2d 126, 129 (10th Cir. 1990) (Texas doctor who "purposefully direct[ed]" his activities towards Oklahoma by rendering his diagnosis to the plaintiff "in Oklahoma, through the mail, knowing its extreme significance and that it would be the basis of [the plaintiff's] further treatment there" was subject to jurisdiction in Oklahoma.); *McGee v. Riekhof*, 442 F.Supp. 1276 (D.Mont. 1978) (Utah ophthalmologist's telephone call to Montana advising a patient to return to work was a negligent act in Montana and subjected the defendant doctor to jurisdiction in Montana).

The same distinction should hold for attorneys: they should be subject to jurisdiction in states beyond their place of residence where they direct their incorrect advice and where they know their advice will have impact. The decision below ignores the existing and emerging legal and economic reality and establishes a precedent that would allow a lawyer to evade any jurisdiction by the clever use of a computer modem. When HHR first learned the Houston Biotech securities had been oversold in Texas, its *first concern* was that Texas might require the sales to Texas investors to be rescinded (FST at 503-04). Despite foreseeing that frightening possibility, HHR proceeded to advise Shearson without the slightest effort to ensure the accuracy of its advice concerning Texas law. Because of that lack of care and HHR's divided loyalties by representing Houston Biotech, the result was exactly as HHR had foreseen -- Texas required Shearson to rescind the sales of Houston Biotech securities to Texas investors.

Jurisdiction over Shearson's breach of fiduciary duty claims is even more clear. Apparently unable to respond to the jurisdictional basis for this claim, HHR simply ignores it. As explained in Shearson's petition, the jurisdictional connection to this claim is manifest: the breach of fiduciary duty arose out of HHR's voluntary representation of a Texas entity in regards to the registration in Texas of that entity's securities, the disclosure in Texas of Shearson's confidential communications, and HHR's efforts to ensure that Shearson, and not its Texas client or itself, bore the ill-effects of the HHR-caused Texas rescission, not to mention that HHR's breach of its fiduciary duties resulted in the rescission of the Texas offering.

Conclusion

While it is manifestly true that the lower courts faithfully recited the jurisdictional rubrics formulated by this Court, the standards thus far enunciated by this Court do not address the troublesome relation between the merits of a claim and the existence of personal jurisdiction, a gap that leaves room for error as in this case. And, as HHR admits, there is no rigid constitutional formula; rather "minimum contacts analysis has been refined by identifying recurring fact patterns and outlining guidelines for application of the due process test to these patterns." Opposition at 16. Particularly as narrowed by the lower courts' merits determinations, which are the real foundation for their rulings, not this Court's standard formulation, this action presents the unique question worthy of review -- can legal advice alone subject a lawyer to jurisdiction when it is understood that the client will act based on that advice in the forum state?

Petitioners respectfully pray that their petition for writ of certiorari be granted.

Respectfully submitted,

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